Supreme Court, U.S.
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No.

In the Supreme Court of the United States

SAMUEL ANTONIO CONSTANZA ALVARADO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

MARK H. BODNER
3925 University Drive
Fairfax, Virginia 22030
(703) 385-6667

LAWRENCE S. ROBBINS*
DANIEL R. WALFISH
Robbins, Russell, Englert, Orseck & Untereiner LLP
1801 K Street, N.W.
Suite 411
Washington, D.C. 20006
(202) 775-4500

* *Counsel of Record*

Counsel for Petitioner

QUESTION PRESENTED

Following a joint federal-state investigation, petitioner was arrested by state officers; was interrogated by an agent of the federal Bureau of Alcohol, Tobacco, and Firearms ("ATF"); was charged with state offenses; and immediately requested and was appointed an attorney. Two months later, the same ATF agent interrogated petitioner, outside the presence of his counsel, and petitioner's statements were thereafter used against him in a federal prosecution.

The question presented is:

Whether the court of appeals, in agreement with the First and Fifth Circuits but in conflict with the Second and Eighth Circuits, correctly held that, because of the "dual sovereignty" doctrine, the federal charges were not the same "offense" as the state charges, and thus petitioner's later statements to the ATF agent were not taken in violation of the Sixth Amendment.

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PETITION FOR A WRIT OF CERTIORARI

Samuel Antonio Constanza Alvarado ("Constanza") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-14a) is reported at 440 F.3d 191. The district court's findings of fact and conclusions of law disposing of the motion to suppress (App., *infra*, 15a-19a) were delivered orally. The order denying the motion (*id.* at 20a) is unreported.

JURISDICTION

The court of appeals entered judgment on March 13, 2006. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the Constitution of the United States provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

The Fifth Amendment provides in pertinent part: "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb."

STATEMENT

The facts of this case are straightforward. Petitioner Constanza[1] was arrested in Virginia during a stake-out by federal and state authorities. He was interrogated by an agent of

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[1] The court of appeals referred to petitioner as "Alvarado." In petitioner's culture, however, his primary family name is Constanza, his father's family name. In fact, petitioner refers to himself as "Samuel Constanza." We adhere to that convention here.

the federal Bureau of Alcohol, Tobacco, and Firearms ("ATF"), and subsequently was charged by the Commonwealth of Virginia with conspiracy to distribute cocaine and possession of cocaine with intent to distribute. Constanza requested and was appointed a lawyer — and at that point, his Sixth Amendment right to counsel had clearly attached. Two months later, the Commonwealth dismissed its charges, and the same ATF agent immediately took petitioner into custody and interrogated him about a drug conspiracy alleged in a federal complaint filed the day before. Petitioner made inculpatory statements, which were thereafter used to convict him on federal narcotics charges that substantially overlapped with the prior state charges.

The Fourth Circuit affirmed the convictions, holding that the statements elicited by the ATF agent in connection with the federal charges were not taken in violation of petitioner's Sixth Amendment rights. The court of appeals recognized that the Sixth Amendment generally prohibits law enforcement officers from interrogating a defendant, without his attorney, with respect to "uncharged offenses that constitute the 'same offense' as one an accused has been formally charged with." App., *infra*, 6a. The court concluded, however, that petitioner's state and federal charges were necessarily different offenses for Sixth Amendment purposes because they had been brought by different sovereigns. In so holding, the court acknowledged the division among the circuits on whether "dual sovereignty" principles apply in the Sixth Amendment context. Casting its lot with those circuits that have embraced the dual sovereignty doctrine in this setting, the Fourth Circuit held that the later interrogation did not violate Constanza's Sixth Amendment rights.

A. The Joint Federal-State Investigation and the Appointment of Counsel

1. Acting on a tip that cocaine was being brought up from North Carolina, special agent Justin May of the U.S. Drug

Enforcement Administration ("DEA") set up surveillance in a parking lot in Dumfries, Virginia on October 1, 2003. The operation included, in addition to Agent May, two ATF agents and at least ten Prince William County police officers and detectives. Mar. 29, 2004 Tr. ("Tr.") 3-4, 21, 24.

Following an initial arrest, the county police officers and the federal agents learned that the suspected traffickers had brought half a kilogram of cocaine up from North Carolina and that some associates were staying in Room 333 of a motel across the street. Agent May and a county detective therefore rented a room across from Room 333. Around midnight, Agent May observed petitioner leaving Room 333, and alerted the surveilling officers. The county police arrested petitioner outside the motel and took him to ATF special agents Jordi Clop and Matthew Collins. Agent Clop, speaking in Spanish, read petitioner his *Miranda* rights and briefly interviewed him. Petitioner, who does not speak English, informed the agents that he was staying in Room 338 and consented to its search. Tr. 6-8, 16, 21-27, 29, 35, 40, 42, 58-62, 89-94.

At around 3 a.m. on October 2, Agent May and the county police searched Room 333. They recovered cocaine and other drug paraphernalia. Agent Clop arrived on the scene, and, together with the county officers, proceeded to Room 338, where they found marijuana and a handgun. Tr. 9, 17, 43-44, 63, 73.

Petitioner was then taken to a county police station. There Agent Clop, joined by a county detective, read petitioner his *Miranda* rights and again interrogated him. Tr. 64, 77.

2. The Commonwealth of Virginia arraigned petitioner on charges of possession with intent to manufacture, sell, give, or distribute cocaine, see VA. CODE § 18.2-248 (2004), and conspiracy to manufacture, sell, give, or distribute cocaine, see *id.* §§ 18.2-22, 18.2-256. Petitioner immediately requested an

attorney and was appointed one on October 10, 2003. A preliminary hearing was set for December 12, 2003. Court of Appeals Joint Appendix ("JA") 23-25.

3. Meanwhile, the federal agents continued to investigate the same underlying events. Tr. 65, 79. On December 4, 2003, ATF Agent Collins swore out a complaint alleging conspiracy to distribute 500 grams or more of cocaine in violation of 21 U.S.C. §§ 841(a)(1), 846. JA 26-33.

The next day, petitioner was brought into Prince William County General District Court, where ATF Agent Clop, DEA Agent May, and a county detective who had participated in the October 1 and 2 arrests all were in attendance. The Commonwealth announced that the state charges were being dropped in favor of federal prosecution. Agents Clop and May immediately took petitioner into federal custody and elicited more information relating to the conspiracy alleged in the complaint. They transported him to a nearby police station in Manassas (a trip that took less than one minute), during which time petitioner — who has a fifth-grade education from El Salvador — asked Agent Clop what was going on. The agent replied that everything would be explained at the station. Tr. 9-10, 12, 45-46, 65-66, 102; JA 173.

At the police station, the county detective escorted petitioner and Agents Clop and May to an interview room. According to Agent Clop, petitioner volunteered that he had been wanting to tell his side of the story. Agent Clop interrupted to give *Miranda* warnings, and then interrogated petitioner for approximately 45 minutes. Tr. 11-12, 66-68. Petitioner made statements about his associates' cocaine trafficking activities leading up to October 1, at the same time partially implicating himself. See JA 176-185.

B. The District Court Proceedings

Immediately after the December 5 interrogation, petitioner appeared before a magistrate judge, and a preliminary hearing was scheduled. JA 2. Counsel was appointed several days later, and Constanza was thereafter indicted on one count of conspiracy to distribute 500 grams or more of cocaine in violation of 21 U.S.C. §§ 841(a)(1), 846, and one count of distribution of cocaine in violation of 21 U.S.C. § 841(a)(1). JA 13-18.

Petitioner moved to suppress the incriminating statements he had made during the December 5 interrogation on the grounds, among others, that they were taken in violation of his Sixth Amendment right to counsel. Under this Court's decision in *Texas* v. *Cobb*, 532 U.S. 162 (2001), he noted, the scope of an offense for which the right to counsel attaches is defined by the double-jeopardy formulation articulated in *Blockburger* v. *United States*, 284 U.S. 299, 304 (1932) — two offenses are distinct if each requires proof of a fact that the other does not. Under the *Blockburger* test, petitioner asserted, the conspiracy about which the federal agents interrogated him was the same offense as the conspiracy with which the Commonwealth had charged him — the same offense, in other words, for which he already had representation. Accordingly, argued petitioner, the agents were not permitted to initiate questioning on that offense outside the presence of his lawyer. Tr. 130-136.

Following a hearing that detailed the closely intertwined federal and state investigation, the district court denied the motion. App., *infra*, 20a. The district court explained, in pertinent part, that the federal and state governments represent separate sovereigns, and thus the ATF agents were not interrogating petitioner about the same "offense" following petitioner's release from state custody. See *id.* at 18a-19a. The December 5 inculpatory statements were thereafter introduced

at trial, JA 172-198, and a jury convicted petitioner on both counts, App., *infra*, 21a.

C. The Court of Appeals' Decision

The court of appeals affirmed the convictions.[2] App., *infra*, 1a-14a. At the outset, the court explained that the right to counsel "attaches only after the commencement of formal charges against a defendant," *id.* at 5a-6a, and that "[e]ven though an accused has a Sixth Amendment right to counsel for one offense — because formal charges have been brought — the right does not automatically attach to other offenses with which he has not been charged." *Id.* at 6a. Rather, the court continued, the right to counsel, once attached, extends only to "uncharged offenses that constitute the 'same offense' as one an accused has been formally charged with committing." *Id.* (citing *Texas* v. *Cobb*, 532 U.S. 162 (2001)). In *Cobb*, this Court applied the *Blockburger* double jeopardy test to determine whether two offenses were the same or distinct for purposes of the right to counsel. 532 U.S. at 173.

Taking *Cobb* one step further, the Fourth Circuit observed that another "central feature" of double jeopardy law is the "dual sovereignty" doctrine, under which "federal and state crimes are not the same offense, no matter how identical the conduct they proscribe." App., *infra*, 6a. "Because *Cobb* clearly indicates that the definition of offense is the same in the right to counsel and double jeopardy contexts, 532 U.S. at 173, the dual sovereignty doctrine has equal application in both." *Ibid.* Accordingly, the Fourth Circuit held that "[s]ince defendant's state and federal offenses were inherently distinct under the dual sovereignty doctrine, they cannot be the same offense for purposes of the Sixth Amendment right to counsel." *Id.* at 9a.

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[2] The court vacated petitioner's sentence under *United States* v. *Booker*, 543 U.S. 220 (2005), and remanded for resentencing. App., *infra*, 14a. The sentence is not at issue here.

In so holding, the court below recognized that the circuits are sharply divided over the applicability of the dual sovereignty doctrine in this setting. It chose to "join those circuits that have employed the dual sovereignty doctrine in the Sixth Amendment context" — here it cited decisions from the First and Fifth Circuits — and to "disagree with the Second Circuit's decision to the contrary." App., *infra*, 9a.[3]

REASONS FOR GRANTING THE PETITION

This Court has held that the Sixth Amendment right to counsel is offense-specific, and in *Cobb*, this Court clarified that the scope of an "offense" is defined by the *Blockburger* inquiry from double jeopardy law — does each offense require proof of a fact that the other does not? In the context of double jeopardy claims, moreover, offenses that would otherwise be the same under *Blockburger* are nevertheless distinct when they are brought by different sovereigns. The "dual sovereignty" doctrine has long permitted separate sovereigns to initiate separate prosecutions on what would otherwise be the same offense. The recurring question that has divided the circuit

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[3] The court of appeals observed that "[o]ne of the chief virtues of our system of dual sovereignty is that each sovereign can approach problems in divergent ways." App., *infra*, 11a. In that connection, the court noted that there were certain differences in the way the federal and state governments charged the conspiracy counts in petitioner's case. See *id.* at 10a-11a. For example, whereas the state had charged a conspiracy "on or about October 2, 2003," the federal government charged a conspiracy that ran "from August to October 2003." *Id.* at 11a. And whereas the federal indictment specified an amount of narcotics, the state charges did not. *Id.* The court of appeals did not suggest, however, that as a result of these factual differences in the charging instruments, the state and federal offenses were distinct under *Blockburger*. Nor could it have done so. The two conspiracies were at the very least concentric circles, with the state conspiracy a subset of the federal conspiracy.

courts is whether the dual sovereignty doctrine also applies to the definition of an offense under the Sixth Amendment. Put another way, should "dual sovereignty" be used to define as two separate offenses what would otherwise be a single offense for purposes of the right to counsel? The First, Fifth, and now Fourth Circuits have said yes; the Second and Eighth Circuits, and the Seventh in dicta, disagree. Only this Court can resolve the conflict and clarify the meaning of *Cobb*.

Moreover, the court below chose the wrong side of the conflict. The dual sovereignty doctrine is rooted in core federalism concerns; its purpose is to preserve each sovereign's prerogative to enforce its own laws. But the Sixth Amendment right has nothing to do with those concerns. It is designed rather to protect the defendant in his confrontations with the government, and respecting that right in no way prevents either sovereign from prosecuting violations of its own laws. Indeed, this Court has long rejected claims that the tribunal of one sovereign may overlook constitutional violations committed by the authorities of another. At a minimum, the dual sovereignty doctrine should not apply in a case like this, in which the two sovereigns seamlessly cooperated using a common questioner.

Finally, the rule adopted below creates the potential for manipulation and confusion in an era of joint investigations by the federal and state governments, and at a time of expanded federal criminal jurisdiction. Under the rule adopted below, separate sovereigns working together could easily contrive (as they evidently did here) to interrogate a defendant about an offense with which he has already been charged outside the presence of his lawyer. Constitutional protections should not be so easy to manipulate. This Court should grant the petition and hold that dual sovereignty has no bearing on the scope of the right to counsel.

I. The Court of Appeals' Decision Deepens a Circuit Conflict Regarding the Application of the "Dual Sovereignty" Doctrine to the Scope of an "Offense" Under the Sixth Amendment

The Sixth Amendment right to counsel is "offense specific." *McNeil* v. *Wisconsin*, 501 U.S. 171, 175 (1991). In *Texas* v. *Cobb*, 532 U.S. 162 (2001), this Court held that the scope of the "offense" to which the right attaches is defined by the *Blockburger* test from double jeopardy law. The question in this case is whether, along with the *Blockburger* test, "dual sovereignty" principles under double jeopardy must also be imported into the Sixth Amendment context. Based on a broad (and, in our view, unnecessary) reading of *Cobb*, the court below said yes. In that respect, the Fourth Circuit's decision accords with decisions of the First and Fifth Circuits, but squarely conflicts with decisions of the Second and Eighth Circuits. This case is an ideal vehicle in which to resolve that disagreement about the reach of *Cobb*.

A. Like the Fourth Circuit below, the First and Fifth Circuits have held that *Cobb* requires that the dual sovereignty doctrine applies to the scope of an offense under the Sixth Amendment. In those circuits, even if two offenses would otherwise be the same under *Blockburger*, they are separate offenses for purposes of the right to counsel when prosecuted by separate sovereigns.

1. In *United States* v. *Coker*, 433 F.3d 39 (1st Cir. 2005), the defendant was charged under Massachusetts law with arson and injury to property, and was appointed an attorney. Soon after the incident, the local fire department notified ATF, which began its own investigation. ATF eventually elicited a confession from Coker, who was convicted after the federal district court denied his motion to suppress. *Id.* at 40-41.

The issue on appeal was "whether the uncharged federal arson offense was the same offense as the state arson offense for Sixth Amendment purposes." 433 F.3d at 42. The two offenses had essentially the same elements. Nevertheless, writing for two panel members, Judge Torruella pointed out that *Cobb* had equated the meaning of "offense" in the contexts of double jeopardy and the right to counsel, and that under double jeopardy jurisprudence, "conduct in violation of two separate sovereigns . . . constitutes two distinct offenses." *Id.* at 43. The question for the court thus became "whether the Court in *Cobb* incorporated all of its double jeopardy jurisprudence (including the dual sovereignty doctrine) or merely the *Blockburger* test into its Sixth Amendment right to counsel jurisprudence." *Ibid.*

The majority acknowledged that whereas "[t]he Second Circuit has held that the Court incorporated only the *Blockburger* test into its Sixth Amendment jurisprudence and that the dual sovereignty doctrine does not apply in the Sixth Amendment context," the Fifth Circuit, by contrast, "has taken the position that the dual sovereignty doctrine should be applied in the Sixth Amendment context." 433 F.3d at 43-44. "After carefully examining *Cobb*," the majority concluded that "the dual sovereignty doctrine applies for the purposes of defining what constitutes the same offense in the Sixth Amendment right to counsel context." *Id.* at 44. The First Circuit explained that it was "reject[ing] the reasoning of the Second Circuit . . . and adopt[ing] the reasoning of the Fifth Circuit." *Ibid.*

The court was not persuaded that "applying the dual sovereignty doctrine to cases such as [t]his will permit law enforcement to perform an end run around a defendant's Sixth Amendment right to counsel." 433 F.3d at 45. Under the exception to dual sovereignty articulated in *Bartkus* v. *Illinois*, 359 U.S. 121 (1959), the dual sovereignty doctrine would not apply "if it appears that one sovereign is controlling the prosecution of another merely to circumvent the defendant's

Sixth Amendment right to counsel." 433 F.3d at 45. In the First Circuit's view, "this exception will help prevent law enforcement officials from making an end run around the right to counsel." *Ibid.* The panel had no trouble concluding, however, that the *Bartkus* exception did not apply in that case. *Id.* at 46-47.

Judge Cyr disagreed with the majority's reading of *Cobb*.[4] He pointed out that the Court in *Cobb* did not face, and therefore did not consider the policy issues raised by, prosecutions by separate sovereigns. 433 F.3d at 50. Before *Cobb*, he noted, "there was no question but that the 'separate sovereign' doctrine . . . had no application outside the double jeopardy context." 433 F.3d at 49. The Fourth Amendment protection against unreasonable searches and seizures and Fifth Amendment privilege against self-incrimination are not subject to a dual sovereignty exception, which in those contexts "would encourage collusion between the federal and state sovereigns, one sovereign obtaining evidence in violation of defendants' constitutional rights." *Id.* at 49-50. Judge Cyr took little comfort from the *Bartkus* exception because it fails to reach a great deal of "mutual collusion of independent sovereigns" and "creates a portentous risk of abuse in this age of increasing federal-state cooperation." *Id.* at 51.

2. The Fifth Circuit has likewise embraced the "dual sovereignty" principle in defining the scope of an offense under the Sixth Amendment. *United States* v. *Avants*, 278 F.3d 510 (5th Cir. 2002). In 1966 or 1967, Mississippi charged Avants with the murder of Ben White. Avants was acquitted. Shortly before his trial — that is, at a time when the right to counsel already had attached for the state charge — he was interviewed by, and made incriminating statements to, FBI agents investi-

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[4] He nevertheless concurred because he concluded that any constitutional error was harmless.

gating a different murder. In 2000, the federal government initiated a prosecution for the White murder, and sought to introduce the statements from the FBI interview. *Id.* at 512.

The Fifth Circuit considered whether the federal murder charge was the same offense as the state charge for purposes of the right to counsel. The panel determined that *Cobb* disposed of the issue:

> By concluding without limitation that the term "offense" has the same meaning under the Sixth Amendment as it does under the Double Jeopardy Clause, the Court effectively foreclosed any argument that the dual sovereignty doctrine does not inform the definition of "offense" under the Sixth Amendment. Stated differently, the Supreme Court has incorporated double jeopardy analysis, including the dual sovereignty doctrine, into its Sixth Amendment jurisprudence.

278 F.3d at 517. The Fifth Circuit accordingly held that even if a federal and state offense have identical elements, they "do not constitute the 'same offense' under the Sixth Amendment . . . because they are violations of the laws of two separate sovereigns." *Id.* at 522.

B. By contrast, the Second and Eighth Circuits have held just the opposite — that *Cobb* does not import dual sovereignty into the Sixth Amendment context.

1. In *United States* v. *Mills*, 412 F.3d 325 (2d Cir. 2005), the defendant was charged under Connecticut law with firearms violations, including criminal possession of a firearm by a convicted felon. A day later — when the right to counsel had attached for the state charges — local police officers interviewed Mills. Eight months later, he was indicted by a federal grand jury for unlawful possession of a firearm by a convicted felon, which was conceded to have the same elements

as the state felon-in-possession charge. Mills moved to suppress the statements he had made to the local police. *Id.* at 327-328.

On appeal, the government did not challenge the district court's determination that the interview had violated Mills' right to counsel as to the state charges. 412 F.3d at 328. The government argued, however, that there was no violation as to the federal charge because after *Cobb*, the dual sovereignty doctrine applies to the Sixth Amendment and distinguishes the federal offense from the state offense. *Id.* at 329-330.

The Second Circuit was not persuaded. Citing for support the Eighth Circuit's decision in *United States* v. *Red Bird*, 287 F.3d 709 (2002), and expressly "reject[ing] the government's invitation to follow the Fifth Circuit's lead," 412 F.3d at 330 & n.2, the court observed that "[n]owhere in *Cobb*, either explicitly or by [implication], is there support for a dual sovereignty exception." *Id.* at 330. In the Second Circuit's view, "the fact that *Cobb* appropriates the *Blockburger* test . . . does not demonstrate that *Cobb* incorporates the dual sovereignty doctrine: The test is used simply to define identity of offenses." *Ibid.* The Second Circuit was concerned that:

> [w]here, as here, the same conduct supports a federal or a state prosecution, a dual sovereignty exception would permit one sovereign to question a defendant whose right to counsel had attached, to do so in the absence of counsel, and then to share the information with the other sovereign without fear of suppression. We easily conclude that *Cobb* was intended to prevent such a result.

Ibid.

2. The Eighth Circuit has also declined to apply the dual sovereignty doctrine in defining the scope of Sixth Amendment rights. In *Red Bird*, the defendant was arraigned on a rape

charge in the Rosebud Sioux Tribal Court.[5] The tribal court appointed an attorney, who was also licensed in federal court. The tribal authorities notified an FBI agent of the alleged rape, and helped the agent locate and interview the defendant, who made inculpatory statements. The tribal authorities and the FBI knew of the defendant's representation on the tribal charge but did not notify the lawyer of the interview. The defendant was eventually indicted on federal sexual abuse charges, and moved to suppress his statements. 287 F.3d at 711-712 & n.4.

The Eighth Circuit rejected the government's argument that the tribal and federal charges were separate offenses for Sixth Amendment purposes because they were charged by separate sovereigns. Noting "the way that tribal and federal authorities cooperated in connection with these charges," the court did not "believe that it is appropriate to fully rely on double jeopardy analysis here." 287 F.3d at 714-715. The Eighth Circuit then followed *Cobb*'s command to apply *Blockburger*, and determined that "the federal and tribal complaints charge the same offense for Sixth Amendment purposes" because the charges had "'identical essential elements.'" *Id.* at 715.[6]

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[5] The Rosebud Sioux Tribe's constitution guarantees the right to an attorney in tribal court. Furthermore, as relevant here, Native American tribes and the federal government are separate sovereigns for purposes of double jeopardy law. See *United States* v. *Lara*, 541 U.S. 193, 210 (2004).

[6] As the court below recognized (see App., *infra*, 9a), the Seventh Circuit has strongly suggested that it, too, would decline to apply dual sovereignty principles in deciding the scope of Sixth Amendment rights. In *United States* v. *Krueger*, 415 F.3d 766 (7th Cir. 2005) — a case substantially identical to petitioner's — the defendant was charged in state court with marijuana trafficking, and an attorney was assigned to represent him. Local officials then dismissed their charges in favor of federal prosecution, and incriminating statements were elicited by federal agents. Those statements were then offered to

II. The Court of Appeals' Decision Is Wrong

A. In our view, the Second and Eighth Circuits (and quite likely, the Seventh as well) have much the better of the argument. By wrenching isolated language from *Cobb* and applying it to circumstances entirely different from those at issue in that case, the court of appeals ignored both the purposes of the dual sovereignty doctrine and the role of the Sixth Amendment right to counsel in our system of justice.

The dual sovereignty doctrine is rooted in core federalism concerns. The doctrine reflects the basic principle that "an act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be punished by each." *United States* v. *Lanza*, 260 U.S. 377, 382 (1922). The doctrine is intended, in short, to respect the *authority* of each sovereign to prosecute cases, even when another sovereign has already prosecuted the defendant for identical conduct.

By contrast, the right to counsel is designed to protect the *defendant* in his confrontations with the *government*. Respecting the Sixth Amendment right in no way prevents any sovereign from prosecuting violations of its laws. The decision below thus got off on the wrong foot when it declared at the outset: "The

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enhance the defendant's sentence following a guilty plea. 415 F.3d at 769-774. Although the court of appeals ultimately concluded that the statements could be used for sentencing purposes, it cast serious doubt on whether they were admissible as substantive evidence under the Sixth Amendment. Citing the Eighth Circuit's decision in *Red Bird* and the Second Circuit's decision in *Mills*, the Seventh Circuit observed that "[i]n view of th[e] apparent coordination" between the federal and state officials, "an argument could be made along the lines of *Red Bird* that the federal charges, although brought by a different sovereign, were essentially the same ones that had been asserted against Krueger in state court for purposes of the Sixth Amendment." *Id.* at 778.

instant case touches upon the sovereign authority of the state and federal governments to create and enforce criminal laws." App., *infra*, 1a. That sentiment — fully appropriate in a case where a sovereign's power is truly at stake — is entirely misplaced in a case involving a criminal defendant's right to counsel. Excluding statements made during a police-initiated interrogation about offenses for which petitioner already had counsel would have had absolutely no effect on the federal government's authority to enforce its laws, let alone to create them. Indeed, the only cost saved by the court of appeals' rule is the loss of a particular piece of evidence, not the wholesale foreclosure of prosecution.

Unlike the dual sovereignty doctrine, the *Blockburger* test fits comfortably in the Sixth Amendment context. A defendant who has engaged counsel in a prosecution for one offense may well understand that investigation of a different offense with different elements raises different issues. The defendant may be willing to speak about one offense but not the other. But where state and federal offenses are identical, it is practically unimaginable that a defendant who invokes the right to counsel as to the state offense would not also want counsel as to the federal. To argue for a contrary result on dual sovereignty grounds is to insist on a mechanical application of a doctrine conceived for entirely different purposes.

This Court has consistently been skeptical of assertions that constitutional rights should give way simply because one sovereign has handed its case off to another. Thus, this Court has held that evidence seized by state officers in violation of the Fourth Amendment is inadmissible in a federal criminal trial, *Elkins* v. *United States*, 364 U.S. 206, 223 (1960), and that the Fifth Amendment privilege against self-incrimination prohibits the use in one sovereign's courts of testimony immunized in another's, *Murphy* v. *Waterfront Comm'n of N.Y. Harbor*, 378 U.S. 52, 77-79 (1964). Indeed, before *Cobb*, dual sovereignty

principles had no application outside of double jeopardy law. See also David J. D'Addio, Case Comment, *Dual Sovereignty and the Sixth Amendment Right to Counsel*, 113 YALE L.J. 1991, 1997-1998 (2004) (arguing that the Court "should focus on the individual in the Sixth Amendment context," just as it does in the Fourth and Fifth Amendment contexts, particularly given the opportunities created by federal-state cooperation to frustrate the purposes of the right to counsel).

B. At a minimum, the dual sovereignty doctrine should not apply in cases like this, where there was indisputably a joint investigation and a common questioner — where, in other words, the separate sovereigns behaved in a decidedly non-separate fashion. This is what the Seventh Circuit recognized in *Krueger*, see note 6, *supra*, and it was one of the grounds for the Eighth Circuit's decision in *Red Bird*. If the state and federal authorities jointly investigate and then seamlessly coordinate their prosecutions, the federal government must not be heard to argue that its sovereign prerogatives are so sacrosanct that federal agents may question a defendant in circumstances when state agents could have done no such thing, and then introduce statements that would be flatly inadmissible in state court. Cf. Daniel A. Braun, *Praying to False Sovereigns: The Rule Permitting Successive Prosecutions in the Age of Cooperative Federalism*, 20 AM. J. CRIM. L. 1, 73 (1992) (arguing in the double jeopardy context that "[t]he Court should recognize the dual sovereignty doctrine as a fiction when" — because of federal-state cooperation — "it tells a story that is not true.").

From a defendant's standpoint, distinctions between sovereigns will likely make no sense at all. Indeed, in this case, Constanza had no apparent reason to distinguish the "federal" interrogation from the "state" interrogations. The questioner in each instance was the same ATF agent. What is more, the "state" interrogations occurred in the company of the local police, after they arrested petitioner and turned him over to the

agent. The "federal" interrogation occurred in a local police station. The county detective who escorted petitioner and the ATF agent to an interview room at the station had participated in the October 1 and 2 stake-out and attended the state-court hearing that very day. Under such circumstances, a defendant could be forgiven for the perception that he was being interrogated about offenses for which he already had counsel.

III. The Court of Appeals' Decision Presents an Important and Recurring Issue of Constitutional Criminal Law

A. The question presented here comes up regularly. The six courts of appeals decisions reviewed above are far from the only ones to have considered the applicability of dual sovereignty to the Sixth Amendment in light of *Cobb*.[7] Indeed, even before *Cobb*, numerous courts had faced fact patterns that, post-*Cobb*, would raise the precise issue presented here, and many specifically considered whether dual sovereignty could separate what would otherwise have been (under pre-*Cobb* standards) the same offense for Sixth Amendment purposes.[8]

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[7] See *United States* v. *Stroman*, No. CRIM. 05-66-P-S, 2006 WL 83404, at *17 (D. Me. Jan. 9, 2006) (M.J.) (following First Circuit in *Coker*), *aff'd*, 2006 WL 348321 (D. Me. Feb. 14, 2006); *United States* v. *Terrell*, No. 02-40154-02-JAR, 2005 WL 643464, at *4 (D. Kan. Jan. 11, 2005); *United States* v. *Bowlson*, 240 F. Supp. 2d 678, 684 (E.D. Mich. 2003) (rejecting dual sovereignty because the federal and state investigations were intertwined); *United States* v. *Gidden*, No. 02-CR-947 (JBW), 2003 WL 22992074, at *3 (E.D.N.Y. Dec. 16, 2003) (following Fifth Circuit in *Avants*); see also *United States* v. *Plumman*, 409 F.3d 919, 926-927 (8th Cir. 2005) (declining to follow *Red Bird* because FBI agent not aware of pending tribal charge at time of interview); *United States* v. *Hudson*, 267 F. Supp. 2d 818, 821-822 (S.D. Ohio 2003) (*Blockburger* test used to separate charged state and uncharged federal offenses without resort to dual sovereignty).

[8] See *United States* v. *Covarrubias*, 179 F.3d 1219, 1225-1226 (9th Cir. 1999); *United States* v. *Swiger*, 172 F.3d 46, 1999 WL 22728, at

There are good reasons to believe that the issue will arise with still greater frequency in the future. For one thing, federal and state authorities have increasingly cooperated on law-enforcement, particularly in the narcotics context. See, *e.g.*, Sandra Guerra, *The Myth of Dual Sovereignty: Multijurisdictional Drug Law Enforcement and Double Jeopardy*, 73 N.C. L. REV. 1159, 1180-1187 (1995). As a result, the occasions for confusion about — or even outright manipulation of — a defendant's Sixth Amendment right to counsel can be expected to multiply. This case is an excellent illustration: Federal and state officials investigated the case jointly; they interrogated the defendant jointly; and they passed the prosecutorial baton from one to the other just in time to elicit an uncounseled statement that neither government on its own could have secured.

The increasing federalization — perhaps over-federalization — of state law doubly ensures that the issue presented in this case will recur with great regularity. See Paul Rosenzweig,

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*2-3 (4th Cir. 1999) (table decision); *United States* v. *Melgar*, 139 F.3d 1005, 1013-1016 (4th Cir. 1998); *United States* v. *James*, 156 F.3d 1240, 1998 WL 482938, at *2 (9th Cir. 1998) (table decision); *United States* v. *Laury*, 49 F.3d 145, 150 n.11 (5th Cir. 1995); *United States* v. *Fairchild*, 24 F.3d 250, 1994 WL 161949, at *1 n.1 (9th Cir. 1994) (table decision); *United States* v. *Martinez*, 972 F.2d 1100, 1103-1105 (9th Cir. 1992); *United States* v. *Swift Hawk*, 125 F. Supp. 2d 384, 387-389 (D.S.D. 2000); *Hurd* v. *Stinson*, No. 99 CIV. 2426 LBS, 2000 WL 567014, at *12 n.12 (S.D.N.Y. May 10, 2000); *United States* v. *Foreman*, 993 F. Supp. 186, 191 (S.D.N.Y. 1998); *United States* v. *Santiago*, 3 F. Supp. 2d 392, 396-397 (S.D.N.Y. 1998); *United States* v. *Holland*, 59 F. Supp. 2d 492, 502-504, 507-508 (D. Md. 1998); *United States* v. *Friedman*, No. 95-CR-192 (S-3) (ARR), 1996 WL 612456, at *34-35 (E.D.N.Y. June 25, 1996); *United States* v. *Rodriguez*, 931 F. Supp. 907, 926-928 (D. Mass. 1996); *United States* v. *Olsen*, 840 F. Supp. 842, 849-853 (D. Utah 1993); *United States* v. *Louis*, 679 F. Supp. 705, 709 (W.D. Mich. 1988); *People* v. *Riggs*, 568 N.W.2d 101, 117-118 (Mich. Ct. App. 1997).

Overcriminalization: An Agenda for Change, 54 AM. U. L. REV. 809, 818 (2005) ("much of the growth of federal crimes [is] a result of federal law taking on too many responsibilities that were best left to state law enforcement agencies"). As a result of "[t]he expanding overlap of federal and state law," there will be many more occasions in the future in which a common course of conduct will give rise to both federal and state investigations and potential prosecutions. Sara Sun Beale, *The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization*, 54 AM. U. L. REV. 747, 770-771 (2005). The opportunities for mistakes and abuses with respect to Sixth Amendment rights are apt to increase.

B. The question presented is also surpassingly important. The Sixth Amendment right to counsel — a right that protects all other rights in a criminal case, see *Johnson* v. *Zerbst*, 304 U.S. 458, 462-463 (1938) — "arises from the fact that the suspect has been formally charged with a particular crime and thus is facing a state apparatus that has been geared up to prosecute him." *Arizona* v. *Roberson*, 486 U.S. 675, 685 (1988). The purpose of the right is to "'protec[t] the unaided layman at critical confrontations' with his 'expert adversary,' the government." *McNeil* v. *Wisconsin*, 501 U.S. 171, 177 (1991).

The purposes of the Sixth Amendment are severely compromised by the rule adopted by the court below and those circuits that agree with it. The dual sovereignty doctrine permits two sovereigns to "do in tandem what none could do alone: deliberately elicit incriminating statements from the accused without the knowledge or presence of [his] attorney, and use those statements . . . at a trial on the very matter for which the defendant is represented." D'Addio, *supra*, at 1996. The potential for a shell game here has troubled a number of courts, including, as discussed earlier, the Second Circuit in *Mills*. See also, *e.g.*, *United States* v. *Martinez*, 972 F.2d 1100, 1105 (9th Cir. 1992); *United States* v. *Bowlson*, 240 F. Supp. 2d 678, 684

(E.D. Mich. 2003). Indeed, similar concerns in the Fourth Amendment context prompted this Court's decision in *Elkins*. See 364 U.S. at 222 ("If . . . it is understood that the fruit of an unlawful search by state agents will be inadmissible in a federal trial, there can be no inducement to subterfuge and evasion with respect to federal-state cooperation in criminal investigation.").

At the same time, however, cooperation between federal and state or tribal authorities is often crucial to the effective enforcement of criminal laws. *E.g.*, *Elkins*, 364 U.S. at 211, 221. The First Circuit in *Coker* was satisfied that cooperation is unlikely to slide into collusion because the so-called *Bartkus* exception overrides the dual sovereignty doctrine when a successive state prosecution is "a sham and a cover for a federal prosecution," *Bartkus*, 359 U.S. at 124. Not so. This "sham prosecution" exception is so narrow as to be non-existent. Commentators have called it "illusory," and some courts have questioned its existence.[9] As a practical matter, under the rule adopted below, there is nothing to prevent federal and state authorities from tag-teaming a defendant, outside the presence of counsel, until he confesses — knowing that the only consequence is that the statement cannot be used in the jurisdiction that assigned the defendant a lawyer.

But even if one assumes complete good faith on the part of all law-enforcement officers, the rules of the road are highly uncertain. In New York, Connecticut, Vermont, Arkansas, Missouri, Iowa, Minnesota, North Dakota, South Dakota, and Nebraska, after a criminal defendant engages counsel, defendant and lawyer can both be secure in the knowledge that no law-

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[9] See, *e.g.*, 21 Am. Jur. 2d *Criminal Law* § 370; Braun, *supra*, at 60-61; Michael A. Dawson, Note, *Popular Sovereignty, Double Jeopardy, and the Dual Sovereignty Doctrine*, 102 YALE L.J. 281, 296 (1992); *United States* v. *Angleton*, 314 F.3d 767, 773-774 (5th Cir. 2002); *United States* v. *Brocksmith*, 991 F.2d 1363, 1366 (7th Cir. 1993).

enforcement officer, state or federal, will question the defendant unless the subject of the interrogation concerns a separate offense in the *Blockburger* sense. By contrast, in Maine, New Hampshire, Massachusetts, Rhode Island, Puerto Rico, West Virginia, Virginia, North Carolina, South Carolina, Texas, Louisiana, and Mississippi, state and federal police seamlessly cooperating on an investigation may freely interrogate a defendant about the precise subject of a pending indictment, provided that they plan to use the statement in a jurisdiction other than the one that assigned him a lawyer. The Sixth Amendment right to counsel deserves better.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

MARK H. BODNER
3925 University Drive
Fairfax, Virginia 22030
(703) 385-6667

LAWRENCE S. ROBBINS*
DANIEL R. WALFISH
Robbins, Russell, Englert,
Orseck & Untereiner LLP
1801 K Street, N.W.
Suite 411
Washington, D.C. 20006
(202) 775-4500

* *Counsel of Record*

MAY 2006

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee.

v.

SAMUEL CONSTANZA ALVARADO,
Defendant-Appellant.

No. 04-4969

Appeal from the United States District Court
for the Eastern District of Virginia, at Alexandria.
Gerald Bruce Lee, District Judge.
(CR-04-35)

Argued: January 31, 2006
Decided: March 13, 2006

Before WILKINSON, NIEMEYER, and KING,
Circuit Judges.

WILKINSON, Circuit Judge:

The instant case touches upon the sovereign authority of the state and federal governments to create and enforce criminal laws. The Commonwealth of Virginia charged defendant with state drug offenses, provided him with counsel, and subsequently dismissed the charges against him. After filing a federal criminal complaint, federal investigators gave defendant appropriate *Miranda* warnings and then questioned him outside the presence of his state-appointed lawyer about his involvement in federal drug crimes. Defendant contends that the incriminating statements he made during this interrogation

should have been suppressed at his federal trial, because they were taken in violation of his Sixth Amendment right to counsel.

The Sixth Amendment right to counsel attaches only to the specific offense with which a defendant is formally charged. *See Texas v. Cobb*, 532 U.S. 162, 167-68 (2001). We hold that federal and state crimes are necessarily separate offenses for the purposes of the Sixth Amendment, because they originate from autonomous sovereigns that each have the authority to define and prosecute criminal conduct. We further hold that the filing of a federal criminal complaint does not trigger the Sixth Amendment right. Since defendant's right to counsel had yet to attach to his federal offenses when he was interrogated, his remarks were properly admitted and we affirm his convictions. However, we vacate defendant's sentence and remand for resentencing pursuant to *United States v. Booker*, 125 S. Ct. 738, 755-56 (2005).

I.

On the evening of October 1, 2003, state and federal law enforcement officers were conducting surveillance of an Econo Lodge Motel in Dumfries, Virginia. The officers had received a tip from a confidential source that cocaine would be delivered to the motel. They observed Francisco Lara-Hernandez and another suspected drug trafficker enter the motel, and state law enforcement officers subsequently arrested them.

Special Agent Jordi Clop of the federal Bureau of Alcohol, Tobacco, and Firearms participated in this surveillance, and interrogated Lara-Hernandez after he was placed under arrest. Lara-Hernandez stated that he had recently returned to the hotel from North Carolina with approximately 500 grams of cocaine. He indicated to Clop that the cocaine was now across the street in Room 333 of the Days Inn Hotel. He also disclosed that three individuals, one wearing a red t-shirt, were in the room and that

two vehicles, including a white truck, were associated with the drug ring. Law enforcement officers observed defendant Samuel Constanza Alvarado (Alvarado), clad in a red t-shirt, exit Room 333 and climb into a white truck. State police officers arrested defendant upon his entering the truck.

Defendant did not speak English, but Agent Clop was fluent in Spanish. Agent Clop gave defendant his *Miranda* warnings, and defendant agreed to talk with Clop. From this conversation, Agent Clop determined that defendant was staying in Room 338 of the Days Inn, and received defendant's permission to search the room. Law enforcement officers eventually recovered 250 grams of cocaine from Room 333 and a suitcase full of marijuana and a handgun from Room 338. In the early morning hours of October 2, 2003, defendant was transported to a police station in Prince William County, Virginia. Agent Clop interrogated him at the police station after defendant was again read his *Miranda* rights.

On October 2, the Commonwealth of Virginia issued arrest warrants for Alvarado. The Commonwealth charged him with both possession with intent to manufacture, sell, give, or distribute cocaine, *see* Va. Code Ann. § 18.2-248 (2004), and conspiracy to manufacture, sell, give, or distribute cocaine, *see id.* §§ 18.2-22, .2-248. According to the warrants, these charges concerned only the events on or about October 2, 2003. Defendant requested counsel, and the Commonwealth appointed him a lawyer. Virginia retained custody of defendant until December 5, 2003, when he had his preliminary hearing. At this hearing, the Commonwealth dismissed its charges against him.

On December 4, 2003, the day prior to Alvarado's preliminary hearing in state court, federal agents had filed a federal criminal complaint against defendant, and requested a warrant for his arrest. This warrant was issued. *See* Fed. R. Crim. P. 3, 4(a). Agent Clop was present at the Prince William County courthouse when defendant's state charges were

dismissed, and immediately took him into federal custody. Defendant was subsequently transported to a Prince William County police station.

At the station, Alvarado told Agent Clop that he was glad to see him and wanted to give him his side of the story. Agent Clop interrupted defendant to give him *Miranda* warnings. In this conversation, defendant provided incriminating statements about his involvement in the drug conspiracy. Specifically, he described in detail the events of October 1-2, 2003. He also mentioned that he had gone on a previous trip to obtain cocaine from a source in North Carolina, and that he had been involved with other coconspirators in drug distribution since at least August 2003. After about forty-five minutes of questioning, Agent Clop took defendant before a judge to make his initial appearance.

On February 5, 2004, a grand jury indicted Alvarado on two counts. First, it charged him with conspiring to distribute 500 grams or more of cocaine, in violation of 21 U.S.C. §§ 841(a)(1), 846 (2000). According to the indictment, defendant conspired with at least three different individuals between August 2003 and October 2003. Second, the grand jury charged Alvarado with distributing cocaine on or about September 27, 2003, in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2 (2000). Prior to trial, defendant moved to suppress all the incriminating statements made over the course of his conversations with Agent Clop. Defendant alleged that these statements were taken in violation of his Fifth and Sixth Amendment rights to counsel. The district court denied his motion, and found Agent Clop properly read defendant his *Miranda* rights.

Alvarado was tried in front of a jury between April 28 and May 4, 2004. At the trial, Agent Clop testified about the incriminating remarks that defendant made to him on December 5, 2003. The jury convicted defendant on both counts. Based on

the Presentence Investigation Report, the district court enhanced defendant's sentence on a number of grounds, including possession of a dangerous weapon and obstruction of justice. It ultimately sentenced him to 121 months on each count, with the sentences to run concurrently. Defendant appeals his convictions and sentence.

II.

Alvarado alleges that his inculpatory statements of December 5, 2003 should have been suppressed at his trial, because they were taken in violation of his Sixth Amendment right to counsel.* He initially contends that commencement of formal proceedings on his state charges caused the Sixth Amendment right to counsel to attach to his federal charges as well, because the state and federal charges were the "same offense."

We disagree. Since they arise from separate sovereigns, state and federal offenses are not the same for purposes of the Sixth Amendment right to counsel. This case, moreover, highlights the fact that different sovereigns often define and prosecute similar crimes in different ways. For even applying the traditional test to determine whether two conspiracies are the same, the state and federal offenses in this case are distinct.

A.

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. amend. VI. The right attaches only after the commencement of formal charges against a defendant. *See Moran v. Burbine*, 475 U.S.

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* Defendant has not appealed the district court's conclusion that he was properly read his *Miranda* rights in accordance with the Fifth Amendment.

412, 431 (1986). The right is also "offense specific," and "cannot be invoked once for all future prosecutions." *McNeil v. Wisconsin*; 501 U.S. 171, 175 (1991). Even though an accused has a Sixth Amendment right to counsel for one offense — because formal charges have been brought — the right does not automatically attach to other offenses with which he has not been charged. *See Texas v. Cobb*, 532 U.S. 162, 168 (2001). Instead, the right only includes uncharged offenses that constitute the "same offense" as one an accused has been formally charged with committing. *See id.* at 172-73. In *Cobb*, the Supreme Court applied double jeopardy's "same offense" test, first articulated in *Blockburger v. United States*, 284 U.S. 299, 304 (1932), to determine whether two state offenses were distinct for purposes of the Sixth Amendment right to counsel. *Id.* at 173. Most importantly, the Court explained that there was "no constitutional difference between the meaning of the term 'offense' in the contexts of double jeopardy and of the right to counsel." *Id.*

A central feature of double jeopardy's definition of offense is the "dual sovereignty doctrine." Applying this doctrine, the Supreme Court has continually held that federal and state crimes are not the same offense, no matter how identical the conduct they proscribe. *See, e.g.*, *Heath v. Alabama*, 474 U.S. 82, 88-89 (1985); *Abbate v. United States*, 359 U.S. 187, 194-96 (1959); *United States v. Lanza*, 260 U.S. 377, 382 (1922); *Moore v. Illinois*, 55 U.S. (14 How.) 13, 19-20 (1852). "[A]n act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be punished by each." *Lanza*, 260 U.S. at 382.

Because *Cobb* clearly indicates that the definition of offense is the same in the right to counsel and double jeopardy contexts, 532 U.S. at 173, the dual sovereignty doctrine has equal application in both. Indeed, if dual sovereignty is a central feature of double jeopardy analysis, it cannot help but be a

central feature of offense-specificity analysis since the two after *Cobb* are constitutionally one and the same. That *Cobb* meant to adopt the dual sovereignty doctrine as a test for offense specificity is apparent from the Court's description of the right to counsel as "'prosecution specific.'" *Id.* at 173 n.3. Since federal and state prosecutions have continually been treated as separate under double jeopardy analysis, *see Abbate*, 359 U.S. at 194-96, the federal offense would not trigger the right to counsel under a general "prosecution specific" framework.

Any other conclusion would be an affront to both state and federal sovereignty. "As every schoolchild learns, our Constitution establishes a system of dual sovereignty between the States and the Federal Government." *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). This fundamental structural precept is deeply-ingrained, and is surely most salient in the realm most central to sovereignty itself, to wit, the ability to protect citizens and punish wrongdoers. "Foremost among the prerogatives of sovereignty is the power to create and enforce a criminal code." *Heath*, 474 U.S. at 93. Because crime is traditionally viewed "as an offense against the sovereignty of the government," *id.* at 88, "the power of punishment appertains to sovereignty, and may be exercised, whenever the sovereign has a right to act, as incidental to his constitutional powers," *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 418 (1819).

We therefore cannot conclude that Virginia has functionally charged defendant with a federal crime, or vice versa. Virginia can no more define what constitutes a federal criminal offense than the federal government can promulgate Virginia's criminal law. By virtue of their separate sovereignty, each may separately establish and enforce criminal laws in accordance with the Constitution's commands. To suggest, as defendant does, that state and federal offenses are the same would strip both sovereigns of a central attribute of sovereignty in derogation of our federal design. *See Heath*, 474 U.S. at 93.

Alvarado nonetheless argues that if the dual sovereignty doctrine applies to the Sixth Amendment right to counsel, state and federal governments will manipulate their separate prosecutions to deprive the criminally accused of this right. But a defendant's constitutional guarantees are not furthered by melding together federal and state sovereignty, and throwing overboard our federal system's primary shield against government abuse. *See Gregory*, 501 U.S. at 459 ("In the tension between federal and state power lies the promise of liberty."). Rather, a defendant's rights are safeguarded by properly enforcing them in each respective sovereign's sphere.

Both the state and federal governments, for example, must respect the Sixth Amendment right to counsel once each brings its own formal charges, *see Moran*, 475 U.S. at 431. *See also Michigan v. Jackson*, 475 U.S. 625, 636 (1986). And the Fifth Amendment right to counsel applies broadly to all law enforcement custodial interrogation, state or federal. *See McNeil*, 501 U.S. at 178; *Miranda v. Arizona*, 348 U.S. 436, 478-79 (1966). Indeed, when the defendant in *Cobb* made the similar argument that *Cobb's* offense-specific rule would "prove 'disastrous' to suspects' constitutional rights," the Court likewise responded that defendants would still retain the right to consult with counsel before law enforcement officers conduct custodial interrogation. *See Cobb*, 532 U.S. at 171-72 & n.2; *see also United States v. Montgomery*, 262 F.3d 233, 247 (4th Cir. 2001) (noting that *Cobb* "calls into question the viability of any 'collusion exception' to the offense-specific rule").

The circumstances before us illustrate that the operation of the Fifth and Sixth Amendment rights to counsel can adequately protect the criminally accused in each sovereign's respective sphere. Defendant was formally charged with state offenses, and Virginia, following the dictates of the Sixth Amendment, provided him counsel. Defendant was later placed in federal custody, and the district court found that Agent Clop properly

read him his *Miranda* rights. In fact, Agent Clop testified that Alvarado was eager to speak on December 5, and Clop had to interrupt him in order to provide the required warnings. And while federal and state law enforcement authorities did engage in joint investigation, such collaborative efforts can hardly be dispositive of government misconduct. *See Bartkus v. Illinois*, 359 U.S. 121, 123-24 (1959). The record squarely shows that each sovereign properly accorded defendant the safeguards the Constitution requires in their separate prosecutions.

As the foregoing analysis indicates, we join those circuits that have employed the dual sovereignty doctrine in the Sixth Amendment context. *See United States v. Coker*, 433 F.3d 39, 44-45 (1st Cir. 2005); *United States v. Avants*, 278 F.3d 510, 517 (5th Cir. 2002). And we respectfully disagree with the Second Circuit's decision to the contrary. *See United States v. Mills*, 412 F.3d 325, 330 (2d Cir. 2005); *see also United States v. Krueger*, 415 F.3d 766, 775-78 (7th Cir. 2005) (suggesting the same). Due to the nature of dual sovereignty, the Sixth Amendment right to counsel in the state proceedings did not survive the dismissal of state charges. Since defendant's state and federal offenses were inherently distinct under the dual sovereignty doctrine, they cannot be the same offense for purposes of the Sixth Amendment right to counsel.

B.

The facts of this case are, moreover, illustrative of the broader principle that sovereigns can and often do define and prosecute similar criminal conduct in divergent ways. Alvarado argues that since both the federal and state charges each included a count of conspiracy to distribute cocaine, the offenses must be the same. But, in fact, the state and federal governments elected to enforce their criminal laws differently, for they prosecuted defendant on separate conspiracies altogether.

The Double Jeopardy Clause prevents the government from splitting a single conspiracy into multiple offenses, *United States v. Cole*, 293 F.3d 153, 158 (4th Cir. 2002), and we employ a totality of the circumstances test to decide whether two conspiracies are distinct, *see United States v. Mackins*, 315 F.3d 399, 410 (4th Cir. 2003); *Cole*, 293 F.3d at 158; *United States v. Ragins*, 840 F.2d 1184, 1188 (4th Cir. 1988). Five general factors guide this determination:

> (1) the time periods covered by the alleged conspiracies; (2) the places where the conspiracies are alleged to have occurred; (3) the persons charged as coconspirators; (4) the overt acts alleged to have been committed in furtherance of the conspiracies, or any other descriptions of the offenses charged which indicate the nature and scope of the activities being prosecuted; and (5) the substantive statutes alleged to have been violated.

Cole, 293 F.3d at 158 (internal quotation marks omitted). The test is a flexible one; some factors may be more important than others depending on the circumstances of the case. *United States v. MacDougall*, 790 F.2d 1135, 1144 (4th Cir. 1986). We see no reason why this test should not also apply to the Sixth Amendment right to counsel, and make use of it here. *See Cobb*, 532 U.S. at 173 (no constitutional difference between meaning of "offense" in double jeopardy and right to counsel contexts).

Applying these factors, it is evident that the federal government was charging defendant with a much more extended and pervasive drug conspiracy than was the Commonwealth. In the first place, "the time periods covered by the alleged conspiracies," *Cole*, 293 F.3d at 158, were not the same. The federal indictment charged defendant with conspiring to distribute cocaine from August to October 2003, whereas the Commonwealth's arrest warrants only identified the relevant

conduct as occurring on or about October 2, 2003, the night of the events at the Days Inn. Moreover, the affidavit in support of the federal criminal complaint suggested defendant had been involved in drug distribution since January 2003. Nowhere in the record does the Commonwealth make such an assertion.

The charges in the federal indictment and the evidence introduced at defendant's federal trial also described a conspiracy broader in scope than the one alleged in the state charge. *See Cole*, 293 F.3d at 158. The federal indictment charged defendant and his coconspirators with taking numerous trips to North Carolina to obtain cocaine. And evidence adduced at trial indicated that defendant's drug distribution did not simply occur out of the Days Inn Hotel, as he had previously helped deliver cocaine to a customer in a different location. The Commonwealth's arrest warrants, by contrast, encompassed only distinct events on or about a single day.

Finally, the federal indictment charged defendant with conspiracy to distribute 500 grams of cocaine, whereas the Commonwealth did not designate a drug amount. The drug quantity was a substantive element of the federal crime. *See United States v. Promise*, 255 F.3d 150, 156-57 (4th Cir. 2001) (en banc) (interpreting 21 U.S.C. § 841). These differences provide ample support for the conclusion that the conspiracies were not the same offense.

One of the chief virtues of our system of dual sovereignty is that each sovereign can approach problems in divergent ways. Though sovereigns can criminalize similar conduct, they might have distinct objectives and resource constraints in doing so. Here, Virginia and the federal government, as separate sovereigns, have operated differently from one another in defining and prosecuting their separate conspiracy statutes. That the Commonwealth was charging defendant with conspiracy to distribute a finite amount of drugs on one day should not stop the federal government from prosecuting a more widespread

conspiracy to distribute a greater amount of drugs over a several-month period.

III.

Alvarado also contends that, even if his state and federal offenses are distinct, his Sixth Amendment right to counsel still attached to his federal offenses, because law enforcement officers had filed a federal criminal complaint prior to his December 5 interrogation. We disagree with defendant's contention because it misunderstands the essential nature of the Sixth Amendment right.

By its own terms, the Sixth Amendment applies to "criminal *prosecutions*" as opposed to criminal *investigations*. U.S. Const. amend. VI (emphasis added). The Supreme Court has thus repeatedly held that the Sixth Amendment right to counsel "attaches only at or after the initiation of adversary judicial proceedings against the defendant." *United States v. Gouveia*, 467 U.S. 180, 187 (1984); *see also Fellers v. United States*, 540 U.S. 519, 523 (2004) (same); *McNeil*, 501 U.S. at 175 (same). This is for good reason. It is only at this point that the criminal "process shifts from investigation to prosecution," *United States v. D'Anjou*, 16 F.3d 604, 608 (4th Cir. 1994), and only at this time that the accused confronts "the prosecutorial forces of organized society," *Moran*, 475 U.S. at 430 (internal quotation marks omitted).

The filing of a federal criminal complaint does not commence a formal prosecution. Rather, the main reason a law enforcement officer files such a complaint is to establish probable cause for an arrest warrant. *See* Fed. R. Crim. P. 3, 4(a); *United States v. Moore*, 122 F.3d 1154, 1156 (8th Cir. 1997). The criminal process is still in the investigative stage, and "the adverse positions of government and defendant" have yet to solidify. *Gouveia*, 467 U.S. at 189 (internal quotation marks omitted). The filing of the federal complaint, therefore, can no

more be characterized as "the initiation of adversary judicial proceedings against the defendant," *id.* at 187, than can the filing of an affidavit in support of a search warrant:

> This conclusion is buttressed by our previous holding that the right to counsel does not attach immediately after arrest and prior to arraignment. *See D'Anjou*, 16 F.3d at 608 (citing *Moran*, 475 U.S. at 430); *see also Gouveia*, 467 U.S. at 190 ("[W]e have never held that the right to counsel attaches at the time of arrest."); *United States v. Hylton*, 349 F.3d 781, 787 (4th Cir. 2003) (filing Maryland statement of charges did not prompt Sixth Amendment right to counsel). If an arrest does not initiate the Sixth Amendment right to counsel, the federal criminal complaint — whose main purpose is to establish probable cause for the arrest — logically should not either. *See Moore*, 122 F.3d at 1156. Any other rule would provide less protection to those arrested without warrants, "discouraging the use of warrants in making arrests for federal crimes." *Id.*

It will come as no surprise, therefore, that our sister circuits have also held that the filing of a federal criminal complaint does not give rise to any Sixth Amendment right. *See, e.g., Beck v. Bowersox*, 362 F.3d 1095, 1101-02 & n.4 (8th Cir. 2004); *United States v. Langley*, 848 F.2d 152, 153 (11th Cir. 1988) (per curiam); *United States v. Pace*, 833 F.2d 1307, 1312 (9th Cir. 1987); *United States v. Duvall*, 537 F.2d 15, 22 (2d Cir. 1976). Since the federal criminal complaint did not give rise to defendant's Sixth Amendment right to counsel, the incriminating statements he made on December 5 were admissible at his federal trial.

IV.

Lastly, defendant contends that the district court enhanced his sentence in violation of *United States v. Booker*, 125 S. Ct. 738, 755-56 (2005). Defendant objected to his sentence at his sentencing, and preserved his argument here. The government

concedes that there is *Booker* error, and we agree. The district court enhanced defendant's sentence based on facts the defendant did not admit and the jury did not find. For example, it added two points to defendant's offense level for possession of a firearm and another two points for obstruction of justice. *See* U.S.S.G. §§ 2D1.1(b)(1), 3C1.1 (2003). These enhancements increased defendant's sentence beyond what he could have received under the Guidelines based on the jury factual findings alone, and were in violation of *Booker*. *See, e.g.*, *United States v. Hughes*, 401 F.3d 540, 547 (4th Cir. 2005). Consequently, we must vacate defendant's sentence and remand to the district court for resentencing in accordance with the procedures set forth in *Hughes*, 401 F.3d at 546-47, and *United States v. Green*, No. 05-4270, slip op. at 6-8 (4th Cir. Feb. 6, 2006).

V.

For the foregoing reasons, we affirm defendant's convictions, but vacate his sentence and remand to the district court for resentencing.

AFFIRMED IN PART;
VACATED AND REMANDED IN PART

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA,
Plaintiff,

vs.

SAMUEL C. ALVARADO,
Defendant.

CR. NO. 04-35-A

TRANSCRIPT OF MOTIONS

March 29, 2004

BEFORE: THE HONORABLE GERALD BRUCE LEE
UNITED STATES DISTRICT JUDGE

* * *

THE COURT: * * *

The following are the findings of fact and conclusions of law, the Court having had an opportunity to observe the witnesses, considered their demeanor and to weigh their credibility and having weighed and considered the arguments of counsel and the authorities submitted.

* * *

The final issue is whether or not the defendant has the right to counsel and whether or not statements were obtained in violation of his right to counsel during the time between the

charges being nolle prossed by Prince William County General District Court and before his indictment or information being presented in federal court for federal drug charges.

The defendant's argument in part is that the defendant had a right to counsel at the time of his arrest and detention in connection with the state drug charges.

And that right continued even over in federal court after the charges were nol-prossed because the federal prosecution was pending by way of a criminal information. The defendant was being detained based on the criminal information. And, therefore, the defendant had a right to counsel. That right to counsel continued, and any statements the defendant may have made after being picked up at the Prince William County jail and being driven to the Prince William County jail before being brought to — before a magistrate judge were obtained in violation of his right to counsel and in violation of his Sixth Amendment Rights.

The Sixth Amendment is offense specific. And I asked counsel what offense specific meant because I wanted to know what his definition was. And I have before me several cases that both sides have cited including the United States versus D'Anjou case from the Fourth Circuit which is a case involving right to counsel issues.

And the Court in that case said that the right to counsel attaches as the process shifts from investigation to prosecution but not before.

And, in this particular case before the Court the question is whether in the issuing of a criminal warrant — a criminal complaint, does the right to counsel attach at the time the criminal complaint is initiated.

And, the government has provided the Court with several cases from the Eleventh Circuit, United States versus Langley,

the Moore case from the Eighth Circuit, both of which say that the right to counsel does not attach upon the filing of a criminal complaint.

And, it seems to me that under Rule 7 of the Federal Rules of Criminal Procedure that 7(a)(1) says felony, an offense other than criminal contempt must be prosecuted by an indictment if it is punishable by, subsection b, by imprisonment for more that one year.

And so, it seems to me that the criminal prosecution in the federal system begins with either indictment or the information.

Subsection 7 — Rule 7 Subsection C nature and contents, Rule 1, Subsection 1 says the indictment or information must be a plain, concise and definite written statement of the essential facts constituting the offense charged.

It seems to me again that the criminal prosecution begins when there is either an indictment or the presentation of an information and that the filing of the criminal complaint in and of itself is insufficient to trigger the right to counsel at that point.

There were several cases submitted by the government including a case called Harris which is unpublished from the Fourth Circuit which I've considered as well.

And finally, the government and the defense both I think addressed the case of United States versus Montgomery.

And again, Montgomery talks about that once a defendant has been charged, even after those charges are dismissed, the police and their agents are not barred from questioning him.

And I think that is the law. That is to say that when an indictment is dismissed, the case ceases to be adversarial and that there is no right to counsel that continues over from the state court case into the federal system.

I think Montgomery in part addresses that. And the issue of whether or not they're factually related doesn't really matter as I see it for purposes of Sixth Amendment under the federal system.

They are two different sovereigns. They're two different offenses. And it seems to me that the offenses, even if compared, they're not the same.

Defense counsel has cited the case of Texas versus Cobb from the Supreme Court, and I've reviewed that case as well. And it seems to me that Texas versus Cobb was a case that dealt with a Texas criminal prosecution. The defendant was being held on burglary charges and was later — and had counsel in the burglary charges, was later questioned about capital murder charges.

And the Supreme Court said that the right to counsel with respect to the burglary charge did not bar the police from interrogating the defendant about murders and his confession was therefore admissible.

The Court applied the Blockburger test in comparing the burglary charge with the capital murder charges, but again they were comparing state charges with other state charges. They were not comparing state charges to federal charges.

And I do not believe it's appropriate to apply the Blockburger test to try to compare conspiracy to distribute cocaine under the state law with conspiracy to distribute 500 grams or more of cocaine under federal law or possession with intent to distribute under state law with the federal law because I think they are dual sovereigns which means each state has the right to prosecute. Indeed each can prosecute concurrently or even one after the other.

The offenses are not the same. And it seems to me that once the state charges are nol-prossed, and even after — even with the

criminal complaint pending that the state public defender could not come over to federal court and necessarily represent the accused on the federal charges until the right to counsel attaches and the right to counsel did not attach here at the time Mr. Alvarado was taken into custody.

So, for these reasons, the Court concludes that the defendant's motion to suppress will be denied. Exception is preserved. Thank you.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

ALEXANDRIA DIVISION

UNITED STATES OF AMERICA,

v.

SAMUEL CONSTANZA ALVARADO,
Defendant.

Criminal Action No. 04-35-A

ORDER

THIS MATTER is before the Court on Defendant's Motion to Suppress. For the reasons stated in open court on March 29, 2004, it is hereby

ORDERED that Defendant Samuel Constanza Alvarado's Motion to Suppress is DENIED.

The Clerk is directed to forward a copy of this Order to counsel.

Entered this 29th day of March, 2004.

/s/ Gerald Bruce Lee
Gerald Bruce Lee
United States District Judge

Alexandria, Virginia
03/29/04

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

UNITED STATES OF AMERICA,

vs.

SAMUEL CONSTANZA ALVARADO,
Defendant.

VERDICT

CASE NO. CR 04-35-A

WE THE JURY, FIND THE DEFENDANT, SAMUEL CONSTANZA ALVARADO:
(Please write "not guilty" or "guilty" in the space provided)

GUILTY as to Count 1.
If your verdict is guilty as to Count 1, indicate the amount below:

X 500 grams or more
_ Less than 500 grams

GUILTY as to Count 2.

/s/ David J. Weary
Foreperson's signature

5-04-04
Date

David J. Weary

APPENDIX E

UNITED STATES DISTRICT COURT
Eastern District of Virginia
Alexandria Division

UNITED STATES OF AMERICA

v.

SAMUEL CONSTANZA ALVARADO
a/k/a Samuel Antonio Constanza Alvarado
Defendant.

Case Number 1:04CR00035-001
USM Number 47179-083

JUDGMENT IN A CRIMINAL CASE
AMENDED

The defendant, SAMUEL CONSTANZA ALVARADO, was represented by Mark H. Bodner, Esquire.

The defendant was found guilty on count(s) 1 and 2 after a plea of not guilty. Accordingly, the defendant is adjudged guilty of the following count(s), involving the indicated offense(s):

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
21:846	Conspiracy to distribute 500 grams or more of cocaine (Schedule II) (Felony)	October 2003	1
21:841(a)(1)	Distribution of cocaine (Schedule II) (Felony)	September 27, 2003	2

As pronounced on October 29, 2004, the defendant is sentenced as provided in pages 2 through 7 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant must notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States Attorney of material changes in economic circumstances.

Signed this 5th day of November, 2004.

/s/ Gerald Bruce Lee
Gerald Bruce Lee
United States District Judge

FILED
AUG 14 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 05-1512

In the Supreme Court of the United States

SAMUEL CONSTANZA ALVARADO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record
ALICE S. FISHER
Assistant Attorney General
JOSEPH C. WYDERKO
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether petitioner's statements to federal law enforcement agents after the dismissal of state charges were taken in violation of his Sixth Amendment right to counsel.

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In the Supreme Court of the United States

No. 05-1512

SAMUEL CONSTANZA ALVARADO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 440 F.3d 191. The oral ruling of the district court (Pet. App. 15a-19a) and its written order (Pet. App. 20a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 13, 2006. The petition for a writ of certiorari was filed on May 25, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Virginia, petitioner was convicted of conspiracy to distribute 500 grams or more of cocaine, in violation of 21 U.S.C. 846; and distri-

bution of cocaine, in violation of 21 U.S.C. 841(a). He was sentenced to 121 months of imprisonment, to be followed by four years of supervised release.

1. On October 1, 2003, a task force composed of police officers from Prince William County, Virginia, an agent from the Drug Enforcement Administration (DEA), and two agents from the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) were conducting surveillance of the Econo Lodge Motel in Dumfries, Virginia. The officers had received information that Francisco Lara-Hernandez was transporting cocaine from North Carolina to the motel. Around 11:30 p.m., the officers arrested Lara-Hernandez. He was questioned by ATF Agent Jordi Clop. Lara-Hernandez said that he had delivered one-half kilogram of cocaine to Room 333 of the Days Inn Hotel, which was located across the street. He also said that three men, one wearing a red shirt, were in Room 333 and that the men were using two vehicles, including a white truck. Pet. App. 2a-3a.

Shortly thereafter, around midnight, DEA Agent Justin May saw petitioner, who was wearing a red t-shirt, leave Room 333 and head towards the motel's back exit. When petitioner began to climb into a white truck, county police officers arrested him. Pet. App. 3a; Gov't C.A. Br. 6; 3/29/04 Tr. 7-8, 16, 24-25, 35-36.

Petitioner did not speak English. ATF Agent Clop read the *Miranda* warnings in Spanish to petitioner, who waived his rights and agreed to talk to the agent. Petitioner told the agent that he was staying in Room 338 and consented to a search of the room. In the meantime, officers had obtained a search warrant for Room 333. Around 3 a.m., the officers searched both rooms. A suitcase of marijuana and a handgun were found in Room 338, and 250 grams of cocaine, scales, and packag-

ing material were found in Room 333. Pet. App. 3a; Gov't C.A. Br. 6-7; 3/29/04 Tr. 9, 16-17, 42-44, 59-61, 92-93.

In the early morning hours of October 2, 2003, petitioner was transported to the county police station. After petitioner again received the *Miranda* warnings and waived his rights, ATF Agent Clop and a county police officer interrogated him. Pet. App. 3a; Gov't C.A. Br. 7; 3/29/04 Tr. 63-64.

Later that day, a county police officer obtained arrest warrants for petitioner. Pet. App. 3a; Gov't C.A. Br. 7. One warrant charged petitioner with conspiracy to manufacture, sell, give, or distribute a controlled substance on October 2, 2003, in violation of Va. Code Ann. §§ 18.2-22 and 18.2-248 (2004). C.A. App. 23. The other warrant charged petitioner with possession with intent to manufacture, sell, give, or distribute cocaine on October 2, 2003, in violation of Va. Code Ann. § 18.2-248 (2004). C.A. App. 24. At his arraignment on the state charges on October 10, 2003, petitioner requested counsel, and a lawyer was appointed to represent him. Pet. App. 3a; Gov't C.A. Br. 7; C.A. App. 25.

Petitioner remained in state custody in the county jail until his preliminary hearing on December 5, 2003. Pet. App. 3a; Gov't C.A. Br. 7. The day before the hearing, on December 4, ATF Agent Matthew Collins filed a federal criminal complaint that charged petitioner with conspiracy to distribute 500 grams or more of cocaine, in violation of 21 U.S.C. 846. 3/29/04 Tr. 85; C.A. App. 26-33. A federal arrest warrant for petitioner was issued. Pet. App. 3a.

At the preliminary hearing on the state charges on December 5, 2003, the Commonwealth of Virginia dismissed the charges against petitioner. ATF Agent Clop

and DEA Agent May attended the hearing and immediately arrested petitioner on the federal charge. They transported petitioner to a nearby police station. Pet. App. 3a-4a; Gov't C.A. Br. 7-8; 3/29/04 Tr. 9-10, 12, 45-46, 64-65, 78-79.

During the drive to the station, petitioner asked ATF Agent Clop what was happening, and the agent responded that he would explain when they reached the station. When they arrived, petitioner told Clop that he was glad to see the agents and wanted to tell them his side of the story. Clop interrupted petitioner to give him *Miranda* warnings. After petitioner waived his rights, he provided incriminating statements about his involvement in the drug conspiracy. Petitioner described the events of October 1 and 2, 2003, and he also disclosed a previous trip to obtain cocaine from a source in North Carolina. In addition, petitioner admitted that he had been involved with other co-conspirators in drug distribution since at least August 2003. After approximately 45 minutes of questioning, petitioner was taken before a magistrate judge for his initial appearance. Pet. App. 4a; Gov't C.A. Br. 8; 3/29/04 Tr. 10-11, 65-67, 79-81, 83-84.

2. On February 5, 2004, a federal grand jury sitting in the Eastern District of Virginia returned an indictment charging petitioner with conspiracy to distribute 500 grams or more of cocaine between August 2003 and October 2003, in violation of 21 U.S.C. 846, and distribution of cocaine on September 27, 2003, in violation of 21 U.S.C. 841(a)(1). Pet. App. 4a. Petitioner moved to suppress the incriminating statements that he had made to federal agents on December 5, 2003, on the ground, *inter alia*, that they were taken in violation of his Sixth Amendment right to counsel. C.A. App. 19-22.

After an evidentiary hearing, the district court denied the motion. Pet. App. 15a-20a. The court ruled that petitioner's Sixth Amendment right to counsel on the federal charges did not attach until the federal indictment was returned. *Id.* at 17a-19a. The court rejected petitioner's claim that the Sixth Amendment right attached with respect to the federal charges when the federal complaint was filed. *Id.* at 16a-17a. The court likewise rejected petitioner's claim that the state charges and federal charges were the same offense and therefore his Sixth Amendment right attached with respect to the federal charges when the state charges were brought. *Id.* at 18a-19a. The court explained that the offenses were "not the same" because they were brought by "two different sovereigns," each of which "can prosecute concurrently or even one after the other." *Id.* at 18a. The court accordingly concluded that "the right to counsel did not attach here at the time [petitioner] was taken into [federal] custody" on December 5, 2003. *Id.* at 19a.

At trial, ATF Agent Clop recounted the incriminating statements made by petitioner during the conversation with the agents on December 5, 2003, following his arrest on the federal complaint. C.A. App. 172-187. The jury found petitioner guilty on both counts. Pet. App. 21a.

3. The court of appeals affirmed. Pet. App. 1a-14a. The court rejected petitioner's claim that his Sixth Amendment right to counsel attached with respect to the federal charges when the state charges were brought because the state and federal charges constituted the "same offense." *Id.* at 5a-12a. The court noted that *Texas* v. *Cobb*, 532 U.S. 162 (2001), applied the Double Jeopardy Clause's "same offense" test set forth in

Blockburger v. *United States*, 284 U.S. 299 (1932), to determine whether two state offenses were the same for purposes of the Sixth Amendment right to counsel. Pet. App. 6a. "Because *Cobb* clearly indicates that the definition of offense is the same in the right to counsel and double jeopardy contexts," the court reasoned that "the dual sovereignty doctrine has equal application in both." *Ibid.* The court noted that "[t]his fundamental structural precept is deeply-ingrained, and is surely most salient in the realm most central to sovereignty itself, to wit, the ability to protect citizens and punish wrongdoers." *Id.* at 7a. The court held that "[s]ince [petitioner's] state and federal offenses were inherently distinct under the dual sovereignty doctrine, they cannot be the same offense for purposes of the Sixth Amendment right to counsel." *Id.* at 9a.

The court of appeals also ruled that the state and federal offenses were "distinct," "even applying the traditional test" for determining whether two conspiracies brought by the same sovereign were the same offense for double jeopardy purposes. Pet. App. 5a. The court reasoned that the federal indictment charged a conspiracy that was "much more extended and pervasive," *id.* at 10a, and "broader in scope," *id.* at 11a, than the one charged in the state arrest warrant, which "encompassed only distinct events on or about a single day," *ibid.* The court also explained that only the federal indictment charged a specific drug amount. *Ibid.*

The court further rejected petitioner's claim that his Sixth Amendment right to counsel attached when the federal complaint was filed on December 4, 2003. Pet. App. 12a-13a. The court held that "[t]he filing of a federal criminal complaint does not commence a formal prosecution" but rather primarily serves "to establish

probable cause for an arrest warrant" under Federal Rules of Criminal Procedure 3 and 4(a). Pet. App. 12a. Finally, the court of appeals vacated petitioner's sentence under *United States* v. *Booker*, 543 U.S. 220 (2005), and remanded for resentencing. Pet. App. 13a-14a.

ARGUMENT

Petitioner contends (Pet. 7-22) that his incriminating statements to the federal agents following the dismissal of the state charges violated the Sixth Amendment. He maintains that his right to counsel had attached with respect to the state charges, and that the state charges constitute the "same offense," for Sixth Amendment purposes, as the federal offenses of which he stands convicted. The court of appeals correctly rejected that contention. Although there is a conflict among the circuits on the issue whether the dual sovereignty doctrine applies in the Sixth Amendment right-to-counsel context, this case is not an appropriate vehicle for resolving the issue. Even assuming that the dual sovereignty doctrine has no application under the Sixth Amendment, petitioner's federal charges were distinct from the state charges. In addition, petitioner's Sixth Amendment right to counsel with respect to the state charges terminated when the state charges were dismissed. And petitioner waived any Sixth Amendment right to counsel after he initiated the conversation with the federal agents about the case. Further review is therefore unwarranted.

1. The Sixth Amendment right to counsel "is triggered at or after the time that judicial proceedings have been initiated . . . whether by way of formal charge, preliminary hearing, indictment, information, or arraign-

ment." *Fellers* v. *United States*, 540 U.S. 519, 523 (2004) (internal quotation marks omitted); *Brewer* v. *Williams*, 430 U.S. 387, 398 (1977). The Court has explained that it is only at that point "that the government has committed itself to prosecute, and only then that the adverse positions of government and defendant have solidified." *Kirby* v. *Illinois*, 406 U.S. 682, 689 (1972) (opinion of Stewart, J.); accord *Moran* v. *Burbine*, 475 U.S. 412, 432 (1986); *United States* v. *Gouveia*, 467 U.S. 180, 189 (1984).

Once the right to counsel attaches with respect to an offense, the Sixth Amendment renders inadmissible in the prosecution's case in chief statements deliberately elicited from the defendant unless the defendant validly waives his right to counsel before making the statements. *Fellers*, 540 U.S. at 523-524; *Michigan* v. *Harvey*, 494 U.S. 344, 348-349 (1990); *Massiah* v. *United States*, 377 U.S. 201, 206 (1964). Moreover, in *Michigan* v. *Jackson*, 475 U.S. 625, 636 (1986), this Court adopted a prophylactic rule under the Sixth Amendment that, "if police initiate interrogation after a defendant's assertion, at an arraignment or similar proceeding, of his right to counsel, any waiver of the defendant's right to counsel for that police-initiated interrogation is invalid." See *Harvey*, 494 U.S. at 349.

In the courts below, petitioner contended that the statements he made to the federal agents on December 5, 2003, should be suppressed under the rule established in *Michigan* v. *Jackson* because his right to counsel had earlier attached with respect to the state charges and the state and federal charges were the "same offense." Pet. C.A. Br. 13; Pet. C.A. Reply Br. 13-14. The court of appeals correctly held that the state and federal charges

were not the same for purposes of the Sixth Amendment.

In *McNeil* v. *Wisconsin*, 501 U.S. 171, 175 (1991), the Court held that the Sixth Amendment right to counsel, and the rule under *Michigan* v. *Jackson* that invalidates subsequent waivers after the right is invoked, are "offense specific." In *Texas* v. *Cobb*, 532 U.S. 162, 173 (2001), the Court clarified that the test for differentiating one offense from another under the Sixth Amendment right to counsel is identical to the test for identifying whether two offenses are the same under the Double Jeopardy Clause. The Court in *Cobb* explained that it saw "no constitutional difference between the meaning of the term 'offense' in the contexts of double jeopardy and of the right to counsel." *Ibid.* The Court thus adopted the elements test of *Blockburger* v. *United States*, 284 U.S. 299 (1932), to decide whether the Sixth Amendment had been invoked on an uncharged state offense based on its prior invocation on a charged state offense. The Court squarely rejected an exception to the Sixth Amendment's offense-specific rule for crimes "factually related" to the charged offense. *Cobb*, 532 U.S. at 168.

Under the "dual sovereignty" principle applied in double jeopardy law, "[w]hen a defendant in a single act violates the 'peace and dignity' of two sovereigns by breaking the laws of each, he has committed two distinct 'offences.'" *Heath* v. *Alabama*, 474 U.S. 82, 88 (1985); see *United States* v. *Lara*, 541 U.S. 193, 210 (2004); *Abbate* v. *United States*, 359 U.S. 187, 194-196 (1959); *United States* v. *Lanza*, 260 U.S. 377, 382 (1922). In this case, accordingly, even if petitioner's Sixth Amendment right to counsel attached with respect to the state charges at his arraignment on October 10, 2003, the

right attached only with respect to the specific *state* offenses of conspiracy to distribute a controlled substance and possession with intent to manufacture, sell, give, or distribute cocaine on October 2, 2003. Petitioner's Sixth Amendment right to counsel with respect to the *federal* offenses of conspiracy to distribute 500 grams or more of cocaine between August 2003 and October 2003 and distribution of cocaine on September 27, 2003, did not attach until he was indicted by a federal grand jury on February 5, 2004, well after he made the statements to the federal agents on December 5, 2003. Because petitioner's Sixth Amendment right to counsel had not yet attached with respect to the federal offense at the time he was questioned by the agents, *Michigan* v. *Jackson* did not require suppression of petitioner's statements to the agents at the federal trial in this case.[1]

2. a. As petitioner notes (Pet. 9-14), and as the court of appeals acknowledged (Pet. App. 9a), there is a conflict among the circuits on the issue whether the dual sovereignty doctrine applies in the context of the Sixth Amendment right to counsel. Like the court of appeals in this case, the First and Fifth Circuits have held that *Texas* v. *Cobb*, *supra*, requires application of the dual sovereignty doctrine in determining whether state and federal charges constitute the same offense for purposes of the Sixth Amendment right to counsel. *United States* v. *Coker*, 433 F.3d 39, 42-47 (1st Cir. 2005); *United States* v. *Avants*, 278 F.3d 510, 515-518 (5th Cir.), cert. denied, 536 U.S. 968 (2002). In contrast, the Second

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[1] Petitioner argued below that his right to counsel attached with respect to the federal charges when the federal criminal complaint was filed on December 4, 2003. The court of appeals rejected that claim, Pet. App. 12a-13a, and petitioner does not challenge that ruling in this Court.

Circuit has declined to apply the dual sovereignty doctrine in the Sixth Amendment context, reasoning that *Cobb* incorporated only the *Blockburger* "same elements" test for determining whether two offenses are the same, even when the offenses are charged by different sovereigns. *United States* v. *Mills*, 412 F.3d 325, 329-330 (2d Cir. 2005).[2]

As the First Circuit noted in *Coker*, the disagreement among the circuits essentially turns on whether "*Cobb* incorporated all of [this Court's] double jeopardy jurisprudence (including the dual sovereignty doctrine) or merely the *Blockburger* test into its Sixth Amendment right to counsel jurisprudence." 433 F.3d at 43. The majority view is correct. In *Cobb*, this Court plainly stated that it saw "no constitutional difference between the meaning of the term 'offense' in the contexts of dou-

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[2] Although petitioner contends (Pet. 13-14) that the Eighth Circuit also rejected the dual sovereignty doctrine in the Sixth Amendment context in *United States* v. *Red Bird*, 287 F.3d 709 (2002), the Eighth Circuit held in that case that federal and tribal complaints charged the same offense for Sixth Amendment purposes because "the tribe and the U.S. worked in tandem to investigate" the offense and tribal sovereignty is "'unique and limited' in character." *Id.* at 715 (quoting *United States* v. *Wheeler*, 435 U.S. 313, 323 (1978)). Accordingly, the First Circuit has noted that "[t]he basis for the court's decision in *Red Bird* is not entirely clear," and that "the limited and unique nature of tribal sovereignty" appeared to cause the Eighth Circuit's concern. *Coker*, 433 F.3d at 46, 47; see note 4, *infra*, (further distinguishing *Red Bird* from this case).

As petitioner also notes (Pet. 14 n.6), the Seventh Circuit in *United States* v. *Krueger*, 415 F.3d 766, 775-780 (2005), expressed doubts over whether the dual sovereignty doctrine should be applied on the facts of that case, *id.* at 775-778, but the court ultimately found it "unnecessary to decide the Sixth Amendment question," *id.* at 778, because the statements at issue were in any event admissible for sentencing purposes. *Id.* at 779-780.

ble jeopardy and of the right to counsel." 532 U.S. at 173. Under petitioner's approach (and that of the Second Circuit in *Mills*), federal and state offenses that are distinct offenses in the double jeopardy context would be considered the same offense in the right-to-counsel context when the charges satisfy the *Blockburger* test. See *Coker*, 433 F.3d at 44 & n.8.

b. Despite the conflict among the circuits on the dual sovereignty issue, this Court's review is not warranted here.

First, it is not clear that refusal to apply the dual sovereignty doctrine would change the outcome of this case. Petitioner has not disputed that the substantive federal and state drug offenses in this case are distinct offenses, *i.e.*, that the state offense of possession with intent to manufacture, sell, give, or distribute cocaine on October 2, 2003, is not the same offense as the federal offense of distribution of cocaine on September 27, 2003. Nor has petitioner disputed that the state conspiracy charge is distinct from the federal substantive drug charge. See, *e.g.*, *United States* v. *Felix*, 503 U.S. 378, 388 (1992) ("[A] substantive crime and a conspiracy to commit that crime are not the 'same offence' for double jeopardy purposes."). For that reason alone, the admission of petitioner's incriminating statements to federal agents on December 5, 2003, with respect to the substantive federal count did not violate the Sixth Amendment. Thus, whether or not the dual sovereignty doctrine applies in the Sixth Amendment context, at the time petitioner made incriminating statements to federal officials on December 5, 2003, petitioner had no right to counsel with respect to the uncharged federal substantive drug charges, for which the court imposed a sentence of 121 months to run concurrently with the

same sentence imposed on the conspiracy count. Pet. App. 5a.

Similarly, contrary to petitioner's assertion (Pet. 7 n.3), the court of appeals concluded that the differences between the state and federal conspiracy charges with respect to the time periods, scope, and amounts of drugs "provide[d] ample support for the conclusion that the conspiracies were not the same offense." Pet. App. 11a. Thus, under the court of appeals' alternative rationale, the admission of petitioner's incriminating statements to federal agents on December 5, 2003, with respect to the conspiracy count likewise did not violate the Sixth Amendment. Although petitioner argues (Pet. 7 n.3) that the state conspiracy was a "subset" of the federal conspiracy, there is no reason for this Court to review the court of appeals' fact-bound contrary conclusion that the two conspiracies were distinct offenses.

Second, even were petitioner correct that the state and federal charges would have constituted the same offense for Sixth Amendment purposes if the state charges had remained pending, the state charges in fact were dismissed before petitioner made incriminating statements to federal agents on December 5, 2003. Petitioner's right to counsel with respect to the state charges terminated with the dismissal of the state charges, because petitioner "was no longer facing a state apparatus that ha[d] been geared up to prosecute him." *United States* v. *Montgomery*, 262 F.3d 233, 247 (4th Cir.) (internal quotation marks omitted), cert. denied, 534 U.S. 1034 (2001). The federal indictment was not returned until February 5, 2004. Because petitioner was not facing any pending prosecution—state or federal—when he was interrogated on December 5, 2003, he had no Sixth Amendment right to counsel at that

time. See *McNeil*, 501 U.S. at 175 (Sixth Amendment right "does not attach until a prosecution is commenced, that is, 'at or after the initiation of adversary judicial criminal proceedings'") (quoting *United States* v. *Gouveia*, 467 U.S. 180, 188 (1984)).[3]

These circumstances also distinguish the Second Circuit's decision in *United States* v. *Mills*, *supra*, on which petitioner relies (Pet. 12-13) for his assertion of a circuit conflict. In *Mills*, the defendant was questioned by local officials while state charges were pending, and therefore at a time when the right to counsel had attached. A fed-

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[3] Some courts have suggested that the Sixth Amendment would be violated if federal and state authorities collude to manipulate the timing of charges to deprive a defendant of his right to counsel. See *United States* v. *Mapp*, 170 F.3d 328, 334 (2d Cir.), cert. denied, 528 U.S. 901 (1999); *United States* v. *Bartelho*, 129 F.3d 663, 675 (1st Cir. 1997), cert. denied, 525 U.S. 905 (1998); *United States* v. *Martinez*, 972 F.2d 1100, 1103-1105 (9th Cir. 1992). It is unclear whether the reasoning of those cases survives *Cobb*'s rejection of an exception to the Sixth Amendment's offense-specific rule for crimes "factually related" to the charged offense. 532 U.S. at 168; see *Montgomery*, 262 F.3d at 247. In any event, a defendant has the burden to prove the existence of actual collusion, which includes proof of a deliberate intent to deprive a defendant of his right to counsel, in order to establish the collusion exception. Cf. *United States* v. *Michaud*, 268 F.3d 728, 734-735 (9th Cir. 2001), cert. denied, 537 U.S. 867 (2002); *United States* v. *Doe*, 155 F.3d 1070, 1078 (9th Cir. 1998) (en banc). Although petitioner repeatedly notes (Pet. 17, 19, 21) that the officers and agents in this case cooperated in their respective investigations, petitioner has not argued (either below or in this Court) that there was improper collusion or bad faith. This Court noted in *Bartkus* v. *Illinois*, 359 U.S. 121 (1959), that cooperation between federal and state authorities is not unusual but rather is "the conventional practice." *Id.* at 123. Petitioner appears to concede (Pet. 21) that he cannot show that the cooperation between the county officers and the federal agents in this case amounted to "a sham and a cover for a federal prosecution" under *Bartkus*. 359 U.S. at 123-124.

eral prosecution was then brought, and the defendant moved to suppress the statement that he had made to the local police. The government conceded for purposes of the appeal that the interview by local police violated the defendant's right to counsel with respect to the state charges, and the Second Circuit held that the statements could not be used in the federal prosecution either. 412 F.3d at 327-328, 330 & n.2. In this case, unlike in *Mills*, the statements in question were not made while state charges were pending.[4]

Third, even assuming petitioner had a Sixth Amendment right to counsel when he was questioned on December 5, 2003, the questioning did not violate the rule in *Michigan* v. *Jackson*, *supra*, because petitioner initiated the communication with federal officials and petitioner waived his right to counsel. The Court made clear in *Michigan* v. *Jackson* that, notwithstanding an accused's invocation of his Sixth Amendment right to counsel, questioning by law enforcement officers may proceed when "the accused himself initiates further communication, exchanges, or conversations with the police." 475 U.S. at 626 (quoting *Edwards* v. *Arizona*, 451 U.S. 477, 485 (1981)); see *Harvey*, 494 U.S. at 352 ("[N]othing in the Sixth Amendment prevents a suspect charged with a crime and represented by counsel from voluntarily choosing, on his own, to speak with police in the absence of an attorney."). Even after an accused has invoked his right to counsel, once he has reinitiated dialogue with the police, he can execute a valid waiver of his

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[4] Similarly, in *United States* v. *Red Bird*, on which petitioner also relies for his assertion of a circuit conflict (Pet. 13-14), charges were pending against the defendant in tribal court and counsel had been appointed for him in those proceedings when the federal agents questioned him. See 287 F.3d at 711-712.

right to counsel without first speaking to his attorney, and *Miranda* warnings are generally sufficient to make an accused aware of his right to have counsel present during the questioning and of the consequences of a decision to waive his Sixth Amendment rights. *Patterson* v. *Illinois*, 487 U.S. 285, 292-294 (1988); see *Harvey*, 494 U.S. at 352-353.

In this case, petitioner waived his Sixth Amendment right to counsel by initiating the conversation with the federal agents and speaking to them after receiving *Miranda* warnings. After being arrested on federal charges, petitioner asked Agent Clop "what was happening" during the drive to the police station, and the agent responded that he would explain when they arrived at the station. 3/29/04 Tr. 65, 83-84; see *Oregon* v. *Bradshaw*, 462 U.S. 1039, 1045-1046 (1983) (defendant initiated conversation by asking, "Well, what is going to happen to me now?"). Once they arrived at the police station, petitioner said "something to the effect of I'm glad you guys are here. I want to talk to you guys. I've been wanting to talk to you guys. I want to give you guys my side of the story." 3/29/04 Tr. 66; accord *id.* at 84. Agent Clop, in the presence of Agent May, then interrupted petitioner and read the *Miranda* warnings from a card. After acknowledging those rights, petitioner again stated that he wished to speak to the agents and described his role in the cocaine conspiracy. *Id.* at 10-11, 66-67.[5] Thus, even assuming petitioner had a

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[5] Petitioner testified at the suppression hearing that he did not receive the complete set of *Miranda* warnings. 3/29/04 Tr. 118-119. The district court ruled that petitioner was not questioned in violation of *Miranda*, finding that he was given the *Miranda* warnings. *Id.* at 174-178. In making that ruling, the court stated that petitioner "may have been confused about whether or not he had a right to have an

Sixth Amendment right to counsel when he was questioned on December 5, 2003, he waived that right.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

PAUL D. CLEMENT
Solicitor General
ALICE S. FISHER
Assistant Attorney General
JOSEPH C. WYDERKO
Attorney

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attorney during the questioning." *Id.* at 177. The court, however, did not expressly address the validity of petitioner's waiver of his *Miranda* rights.

Supreme Court, U.S.
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No. 05-1512

In the Supreme Court of the United States

SAMUEL ANTONIO CONSTANZA ALVARADO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF FOR PETITIONER

MARK H. BODNER
3925 University Drive
Fairfax, Virginia 22030
(703) 385-6667

LAWRENCE S. ROBBINS*
DANIEL R. WALFISH
Robbins, Russell, Englert, Orseck & Untereiner LLP
1801 K Street, N.W.
Suite 411
Washington, D.C. 20006
(202) 775-4500

* *Counsel of Record*

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REPLY BRIEF FOR PETITIONER

The government acknowledges the clear circuit conflict on the question presented and does not dispute that the issue is important, recurring, and deserving of this Court's attention. The government believes, however, that "it is not clear that refusal to apply the dual sovereignty doctrine would change the outcome of this case," Opp. 12, and therefore asks this Court to deny certiorari.

The government is mistaken. The Fourth Circuit declined to rely on any of the alternative grounds now advanced in the government's opposition, and for good reason: Each is either incorrect as a matter of law or fact, or highly controversial in its own right. The court below rested squarely, and solely, on the dual sovereignty doctrine, deepening an existing circuit conflict.[1] Further review is clearly warranted.

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[1] The government suggests (Opp. 11 n.2) that we are mistaken in counting the Eighth Circuit's decision in *United States* v. *Red Bird*, 287 F.3d 709 (2002), among those that have declined to apply the dual sovereignty doctrine. But that is exactly what the Eighth Circuit did: If the Eighth Circuit had adopted the approach of the First, Fifth, and now Fourth Circuits—which have concluded that *Texas* v. *Cobb*, 532 U.S. 162 (2001), *requires* the importation of dual sovereignty principles to the Sixth Amendment context—*Red Bird* simply could not have come out as it did. Nor is it true, as the government suggests, that *Red Bird* is an outlying case because of the Eighth Circuit's concern that "the tribe and the U.S. worked in tandem to investigate" the offense, 287 F.3d at 715. Tandem investigations are one of the most common contexts in which the question presented arises, see, *e.g.*, *United States* v. *Knight*, 2006 WL 1722199 (E.D. Mich. June 22, 2006); *United States* v. *Bowlson*, 240 F. Supp. 2d 678 (E.D. Mich. 2003); see also Pet. 19, making the present case an especially *good* vehicle for resolving the question presented. See pages 8-9, *infra*. Finally, the Eighth Circuit's passing reference to tribal sovereignty as "unique and limited" (287 F.3d at 715) did not control the outcome in that case. In any event, as our petition pointed out (at 14 n.5), it is well settled that Indian tribes are generally separate sovereigns for

I. The Federal Charges Were The Same Offenses As The State Charges

The government's principal "inappropriate vehicle" claim is that there is an alternative holding—*i.e.*, that the state and federal charges were separate offenses even without regard to the dual sovereignty doctrine. Opp. 12-13. That is simply not a fair reading of the Fourth Circuit's decision. True, the opinion contains dicta observing that the state and federal *conspiracy* (but *not* substantive) charges bear certain factual differences. But the court of appeals simply did not—and, as a matter of law, could not—rest on these differences. Indeed, the Solicitor General does not actually contend that the state and federal charges really *are* different offenses under *Blockburger* v. *United States*, 284 U.S. 299 (1932). And that is hardly surprising.

A. The two *conspiracy* charges plainly *were* the same offense under *Blockburger*. The federal indictment charged that "[b]eginning in or about August 2003, and continuing through in or about October 2003," the defendant conspired "to * * * distribute" 500 grams of cocaine. The state charged that "on or about October 2, 2003" (the date the warrant was drawn up), the defendant conspired "to manufacture, sell, give, or distribute" cocaine. Court of Appeals Joint Appendix ("JA") 13-14, 23. Even conceding for the sake of argument that drug quantity was, as the court of appeals thought, "a substantive element of the federal crime" (rather than a sentencing factor), Pet. App. 11a, it would serve only to make the state conspiracy charge a concentric circle within the federal conspiracy charge. It is well settled (and the Solicitor General does not disagree) that in such circumstances—that is, when the two offenses do not *each* require proof of an *additional* fact—the two offenses are not

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purposes of Double Jeopardy. *United States* v. *Wheeler*, 435 U.S. 313, 322-323 (1978); see also *United States* v. *Lara*, 541 U.S. 193 (2004).

separate for purposes of double jeopardy. *Brown* v. *Ohio*, 432 U.S. 161, 168-169 (1977).

As for the differences relating to timing and scope mentioned by the court of appeals, they are non-existent or irrelevant. The conspiracies had the same object: to distribute cocaine. That the federal indictment alleged a longer timeframe is irrelevant. Proof sufficient to convict on a charge alleging an agreement on or about October 2, 2003 to distribute cocaine would surely suffice to convict on the federal conspiracy charge here. See, *e.g.*, *United States* v. *Smith*, 441 F.3d 254, 261 (4th Cir. 2006) ("'Where a particular date is not a substantive element of the crime charged, strict chronological specificity or accuracy is not required.'"); *United States* v. *Rodríguez*, 215 F.3d 110, 117 (1st Cir. 2000) ("The words 'in or about' permit some latitude in proving the time of the offense alleged[.]"). Thus the state offense was nothing more than a subset of the federal offense. Also irrelevant is that the federal conspiracy alleged a series of specific overt acts, including multiple trips to North Carolina over a two-month period. None of those acts is a required element.[2]

Because the two conspiracy charges are so plainly *not* different offenses under *Blockburger*,[3] the court of appeals'

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[2] The court of appeals also mentioned trial testimony regarding the scope of the conspiracy, but trial testimony is irrelevant under *Texas* v. *Cobb*, 532 U.S. 162, 173 (2001). The right to counsel attaches, for each offense, at the time of charging; its scope for purposes of pretrial interrogation cannot possibly be a function of specific evidence later introduced at trial. Likewise, contrary to the court of appeals' suggestion, the federal complaint is also irrelevant, given the court's own holding that the complaint did not trigger the right to counsel.

[3] In ignoring *Blockburger*, the court of appeals invoked entirely inapposite case law. The panel acknowledged that "[t]he Double Jeopardy Clause prevents the government from splitting a single conspiracy into multiple offenses," but then went on to say that "a totality of the circumstances test" is used "to decide whether two

dicta in section II.B. of its opinion are best understood as a discourse on the wisdom of the dual sovereignty doctrine on which the decision below actually rests. As for the government's suggestion (at 13) that this Court should not review the "fact-bound conclusion" that the two conspiracy charges are distinct, that is doubly flawed: The proposition that a lesser offense is the same as a greater offense for purposes of Double Jeopardy is one of law, not fact. See *Brown*, 432 U.S. at 168. More to the point, we are not asking this Court to "review" this issue at all. We are rather asking this Court not to withhold the certiorari power on the basis of a dictum that was not an alternative holding and that the government does not actually defend.

B. The government's intimation (and that is all that it is) that the state and federal *substantive* charges were separate offenses, Opp. 12, is completely misdirected. The United States

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conspiracies are distinct." Pet. App. 10a. The panel saw "no reason why this test should not also apply to the Sixth Amendment right to counsel." *Ibid.*

There is a very good reason, however, why that test is inapplicable here. The cases cited in the opinion below take it for granted that if the same evidence could support convictions on two different conspiracies, then they are the same offense. This *Blockburger*-inspired "same evidence" inquiry, however, creates the potential for abuse in the conspiracy context because "prosecutors could carefully draw two indictments by choosing different sets of overt acts and make one conspiracy appear to be two." *United States* v. *MacDougall*, 790 F.2d 1135, 1144 (4th Cir. 1986). It was to *prevent* such abuse that the Fourth Circuit developed the "totality of the circumstances" test, under which two conspiracies could still be the same offense even if it appears from the indictments that the same evidence would *not* suffice to convict on each. But here the same evidence *would* support conviction on the two conspiracy charges. There was thus no need to reach the "totality of the circumstances" test in the first place. See *United States* v. *Ragins*, 840 F.2d 1184, 1188-1191 (4th Cir.1988); *MacDougall*, 790 F.2d at 1143-1144.

never argued the point below, and it therefore cannot do so now. Indeed, the court of appeals did not even advert to the substantive offenses in the course of its dicta—a further indication (if one were needed) that there is no alternative basis for the decision below.

In fact, the government's and court's silence on this issue may reflect their awareness that the Virginia possession charge likely *is* subsumed by the federal distribution charge. The Virginia courts regard possession as a lesser-included offense of distribution. *E.g.*, *Logan* v. *Commonwealth*, 600 S.E.2d 133, 134 (Va. Ct. App. 2004); *Austin* v. *Commonwealth*, 531 S.E.2d 637, 639 (Va. Ct. App. 2000) ("Proof of the elements of the offense of * * * distributing a controlled substance necessarily encompasses proof of the possession of that same controlled substance.").

Moreover, insofar as the government now implies that the state and federal substantive offenses were separate because they allegedly occurred on different dates, the government is relying on a mischaracterization of the charging instruments. The government states (at 3-4, 12) that petitioner was charged with committing the alleged substantive offenses "on" September 27 and October 2. That is just wrong. The United States and the Commonwealth charged, respectively, distribution "[o]n *or about* September 27, 2003" and possession with intent to distribute "on *or about* October 2, 2003." JA 17, 24 (emphases added). Not only is it settled law that a charge that an offense occurred "on or about" a particular date is satisfied by proof that it occurred reasonably *near* that date, see, *e.g.*, *United States* v. *Nersesian*, 824 F.2d 1294, 1323 (2d Cir. 1987); *United States* v. *Grapp*, 653 F.2d 189, 195 (5th Cir. 1981), but the United States took advantage of precisely that principle in its closing argument to the jury in this very case.[4]

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[4] See 5/4/04 Tr. 40 ("The Judge has instructed you that you need not decide that the offense was committed precisely on the date

II. Dismissal Of The State Charges Is Immaterial

The government's next "inappropriate vehicle" objection is that there was no Sixth Amendment right to counsel at the time of the disputed interrogation because the state case had been dismissed. Opp. 13-15. Judge Wilkinson did not even mention this argument—though it was the very centerpiece of the government's position below—or cite *United States* v. *Montgomery*, 262 F.3d 233 (4th Cir. 2001), on which the United States continues to rely. In fact, footnote 3 of the Solicitor General's brief all but acknowledges the irrelevance of this objection.

The government's argument depends on a view of the right to counsel as something like a light bulb that shuts off the moment the "switch" that originally triggered it—the indictment—is dismissed. But it is easy to see why that view is mistaken. Imagine that only one government—say, a state government—brings charges, dismisses its charges, interrogates the defendant outside the presence of counsel, and then reindicts the defendant, and that all of this is done with the purpose of eliciting uncounseled statements. There would obviously be a Sixth Amendment violation in these circumstances. See, *e.g.*, *State* v. *Frye*, 897 S.W.2d 324, 329-330 (Tex. Crim. App. 1995) (violation on essentially these facts); *United States* v. *Marshank*, 777 F. Supp. 1507, 1525-1527 (N.D. Cal. 1991); cf. *State* v. *Perry*, 515 S.E.2d 582, 592 (W. Va. 1999) (no violation because two years had elapsed between dismissal of first prosecution and elicitation of incriminating statement, and there was no deliberate circumvention).

And if that is true in the state-state and federal-federal cases, it must be equally true in the state-federal case, assuming substantial coordination between the two governments. The only analytical way to distinguish the coordinated state-federal case

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charged. The date need only be reasonably close to the date set forth in the indictment.").

from the state-state case is to apply the doctrine of dual sovereignty—and that of course is the precise issue on which we are seeking review. Thus the dismissal of the state charge is a true non-issue; its materiality to the petitioner's case stands or falls with the viability of the dual sovereignty doctrine.

The government relies on *Montgomery*, but the holding in that case—that a once-indicted defendant does not gain "a permanent constitutional shield," 262 F.3d at 246—is simply beside the point. In *Montgomery*, the incriminating statements were made almost a year after the state charges were dismissed. In this case, the interrogation took place moments after the state charges were dismissed—and just before defendant appeared in federal court, where he was soon appointed an attorney. Pet. 5.

Moreover, *Montgomery* acknowledged what not even the government's briefs below and here could ignore: courts have recognized that "the Sixth Amendment would be violated if state and federal authorities colluded to manipulate the timing of the dismissal and the filing of charges in a manner calculated to deprive an individual of his right to counsel." 262 F.3d at 247 (quoting *United States* v. *Mapp*, 170 F.3d 328, 334 (2d Cir. 1999)); accord Opp. 14 n.3 (citing authorities).[5] That of course was not *Montgomery*, and it was not *Mapp*, but it *is* this case.

The government says (at 14 n.3) that "petitioner has not argued below or in this Court that there was improper collusion or bad faith," but that is untrue. We argued below[6] (and strongly

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[5] The government says (at 14 n.3) that "[i]t is unclear whether the reasoning of those cases survives *Cobb*[]," but that is a non-sequitur. Nothing in *Cobb*'s clarification of offense-specificity has any bearing on the conditions under which dismissal of a charge terminates the right to counsel—or on the implications of deliberate circumvention of Sixth Amendment rights.

[6] *E.g.*, Brief of Appellant at 17 ("Clop's interrogation of Constanza on December 5, 2003 was a knowing and intentional circumvention of his Sixth Amendment right to counsel.").

suggested in the petition (at 19)) that the authorities deliberately circumvented petitioner's rights, which is precisely what the Solicitor General identifies (at 14 n.3) as the gravamen of a claim of improper collusion. In *Mapp*, the Second Circuit approved the district court's determination "that there was no improper collusion" because "the federal and state investigations were conducted independently," "there was no federal involvement in the decision to dismiss the state charges," and "there was no state involvement in the federal authorities' decision to interrogate or charge [the defendant]." 170 F.3d at 334. The other cases cited by the Solicitor General are to the same effect. See *United States* v. *Martinez*, 972 F.2d 1100, 1105 (9th Cir. 1992) ("If * * * the federal and state authorities worked together in shuffling [the] charge from the state to the federal system, then * * * Martinez's statements should be suppressed. * * * If the dismissal of state charges or the initiation of federal interrogation was a mutual endeavor in anticipation of a federal prosecution, then * * * Martinez's Sixth Amendment right * * * was circumvented."); *United States* v. *Bartelho*, 129 F.3d 663, 675 (1st Cir. 1997) (no violation because "the government did not manipulate the robbery charges to avoid the requirements of the Sixth Amendment.").

In this case, it is undisputed that the dismissal of the state charges and the uncounseled interrogation that followed immediately thereafter were the product of close coordination between state and federal officials. These circumstances are precisely what *Mapp*, *Martinez*, *Bartelho*, and the Solicitor General classify as improper collusion. The burden that the United States alleges (at 14 n.3) is on petitioner is therefore amply satisfied. Accordingly, this is precisely the type of case in which the formality of dismissal does not terminate the right to counsel.

Nor is this case the least bit unusual. Many of the cases raising the question presented by the petition are not the "pristine" kind in which a federal interrogation occurs while a state indictment is pending, but rather are the precise type of

scenario at issue here, involving dismissal of state charges, immediately followed by interrogation by federal authorities, immediately followed by federal indictment. Examples include *United States* v. *Krueger*, 415 F.3d 766 (7th Cir. 2005), *United States* v. *Bowlson*, 240 F. Supp. 2d 678 (E.D. Mich. 2003), and *United States* v. *Martinez*, *supra*. Indeed, given the practicalities and prevalence of coordinated investigations and prosecutions, this case is actually a *better* vehicle than the theoretical "pristine" case for resolving the question presented. A ruling by this Court in this case would not only give law-enforcement agencies and defendants exceptionally valuable guidance, it would also almost certainly resolve, *a fortiorari*, the "pristine" case.

III. Petitioner Did Not Waive His Right To Counsel

The government's final "vehicle" riposte is that Constanza waived his Sixth Amendment rights anyway. Opp. 15-17. Judge Wilkinson did not so much as mention the waiver argument, and sensibly so. For one thing, as the Solicitor General acknowledges (at 16 n.5), the district court did not find that petitioner had waived those rights (as opposed to his Fifth Amendment rights). On the contrary, the district court specifically found that Constanza, who has a fifth grade education from El Salvador, "may have been confused about whether or not he had a right to have an attorney during the questioning." 3/29/04 Tr. 179. A waiver, of course, must be "knowing and intelligent," *e.g.*, *Patterson* v. *Illinois*, 487 U.S. 285, 292 (1988), and it is long settled that the determination depends on "the particular facts and circumstances surrounding [each] case, including the background, experience, and conduct of the accused." *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938). Moreover, "it is the State that has the burden of establishing a valid waiver," and "[d]oubts must be resolved in favor of protecting the constitutional claim." *Michigan* v. *Jackson*, 475 U.S. 625, 633 (1986).

The government (at 15-16) invokes the *Michigan* v. *Jackson* principle that a suspect who has asserted the right to counsel may initiate a subsequent conversation with the police. The undisputed facts show, however—and neither court below said anything to the contrary, despite ample opportunity—that the government, not Constanza, initiated the December 5 interrogation. 3/29/04 Tr. 80 (testimony of Agent Clop) ("We initiated the contact with him when we placed him under arrest.").[7] Moreover, the very cases relied on by the government take care to point out (even though the government does not) that the waiver analysis changes when a defendant is, as Constanza was in the state case, already represented by counsel. *Michigan* v. *Harvey*, 494 U.S. 344, 352 (1990) ("To be sure, once a defendant obtains or even requests counsel * * *, analysis of the waiver issue changes."); *Patterson*, 487 U.S. at 290 n.3; see also *Bradshaw*, 462 U.S. at 1051. At a bare minimum, the accused must knowingly relinquish the benefit of the very right he has invoked. See *Harvey*, 494 U.S. at 352-353. That obviously did not happen here, and the government has never contended otherwise. Waiver is another red herring.

CONCLUSION

The petition for a writ of certiorari should be granted.

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[7] The government's citation (at 16) of what is actually a plurality opinion in *Oregon* v. *Bradshaw*, 462 U.S. 1039 (1983), does not get it very far. *Eight justices* in that case agreed on a two-part inquiry that clearly distinguishes between (a) the literal initiation of conversation with the question "what is going to happen to me now?", and (b) a knowing and intelligent waiver of the Sixth Amendment right. *Id.* at 1045-1046, 1054 n.2. *Bradshaw* thus stands for a proposition that is the precise opposite of the government's position here: literal initiation of conversation with police (even assuming that is what happened in this case) does *not* automatically entail waiver.

Respectfully submitted,

MARK H. BODNER
3925 University Drive
Fairfax, Virginia 22030
(703) 385-6667

LAWRENCE S. ROBBINS*
DANIEL R. WALFISH
Robbins, Russell, Englert,
Orseck & Untereiner LLP
1801 K Street, N.W.
Suite 411
Washington, D.C. 20006
(202) 775-4500

* *Counsel of Record*

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